

**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

NO.

78-1001

CARL D. WEST, Petitioner

Versus

PATRICIA ROBERTS HARRIS, SECRETARY OF
THE UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,
Respondent.

and

ANDREW J. DAIGLE, Petitioner

Versus

PATRICIA ROBERTS HARRIS, SECRETARY OF
THE UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

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Petitioners, Carl D. West and Andrew J. Daigle, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on May 26, 1978, and the rehearing denial entered on July 28, 1978.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit, printed in Appendix A, (pp. A-1 - 26) herein, is reported as *West vs. Harris* at 573 F 2d 873. There was no reported opinion of the district court below. The jury verdicts, pertinent rulings and opinions of the United States District Court for the Western District of Louisiana, and notices of appeal are reproduced in Appendix D, (pp. A-55-8, 64-8), Appendix E, (pp. A-100-1, 103-5) and Appendix G, (pp. A-120-132), herein from the Appendix prepared by the trial court for the United States Court of Appeals for the Fifth Circuit.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 26, 1978. (*West*, supra, p. 873, Appendix A, p. A-1) A petition for rehearing was denied on July 28, 1978. (Appendix G, pp. A-133-4) Petitioners *West & Daigle*, filed an application for extension of time in which to file for a Writ of Certiorari in the Supreme Court of the United States. Mr. Justice Powell, on October 11, 1978, signed the order extending the time for filing the petition for writ of certiorari to, and including, December 20, 1978. (Appendix G, p. A-135). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) Whether the United States Court of Appeals for the Fifth Circuit has usurped the function of the jury as finders of fact in these cases?

(2) Whether the United States Court of Appeals for the

Fifth Circuit decision in these cases is totally contrary to the congressional intent and national purpose of the National Flood Insurance Act, as well as contrary to the personal intent and purpose of the contracting policy holders?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The constitutional provision involved in these consolidated cases is the Seventh Amendment to the United States Constitution. (p. 10) The statutory provisions involved are Sections 1302 and 1305 of the National Flood Insurance Act of 1968, (42 U.S.C.A. §§ 4001(f), 4012(a), Appendix B, pp. A-27-32) and the applicable Federal Regulations are 24 CFR §1909.1, ("Flood or Flooding" and "Mudslide") and 24 CFR § 1911.4, (Appendix C, pp. A-33-5)

STATEMENT OF THE CASES

A. *The Daigle Case*

In 1966, the Daigles purchased a new home in Morgan City, which is located in south central Louisiana near the Atchafalaya river. (Appendix D, pp. A-36, 44-5). Subsequently, they purchased a National Flood Insurance policy on their home with policy limits of \$17,500 and a policy term of March 31, 1973, to March 31, 1974. (*West*, supra, p. 876; Appendix A, p. A-8; Appendix D, p. A-39, Appendix F, p. A-116). On April 17 and 18, 1973, a 12 to 14 inch rain fell in the Morgan City area creating flooding conditions in the entire area and on the Daigles' property. (Appendix D, pp. A-36-50) Structural cracking of their home was first heard on April 18, 1973, and the observable cracks continued to

worsen with time. (Appendix D, pp. A-40,51) Because of the emergency flooding situation, the municipal authorities pumped out the drainage canals in and around the Morgan City area. After the deluge a dry period followed through August, 1973. (*West*, supra, p. 877; Appendix A, p. A-9; Appendix D, pp. A-45, 48). The Daigles had never heard or observed any cracking or other structural damage to their home for the seven years prior to the flood. (Appendix D, pp. A-36-7, 40, 52-3). Dr. Capozzoli, defendant's soil expert, opined that the flood had little, if no effect, on the resulting structural damage. He also concluded that the pumping out of the drainage canals or the subsequent dry period was not the cause of the damage. He contended that the nature of the soil support caused uneven settlement under the home's concrete slab over the years which ultimately resulted in the cracking damage. (Appendix D, pp. A-57-62). However, he did admit that if no cracks were found prior to the flood and cracks appeared after the flood, he would agree that the flood was the cause of the structural damage. (Appendix D, p. A-63). Mr. Shumaker, a construction contractor who inspected the house in July, 1973, and who ultimately repaired the Daigles' home, confirmed that the cracking of the masonry and brick had occurred only a few months earlier. (Appendix D, p. A-51). Mr. Guillory, an architectural engineer, observed that the Daigles' home was of typical construction for the soil conditions in the Morgan City area and the slab used was sufficient to support those light, brick veneer type homes. Because there was no appreciable settlement of the Daigles' home as evidenced by lack of cracking, he concluded that the flood directly caused the structural damage. (Appendix D, pp. A-51-5).

The jury concluded that the structural damage to the

Daigles' home was a "direct loss by flood" and awarded \$12,084.56 in damages. (The award was later reduced by the policy deductible of \$200.00) (Appendix D, pp. A-67-8). "Flood" was defined in the policy as a "general or temporary condition of partial or complete inundation of normally dry land areas from (1) the overflow of inland or tidal waters, (2) the unusual and rapid accumulation or runoff of surface waters from any source, or (3) mudslides which are caused or precipitated by accumulation of water on or under the ground." (*West*, supra p. 876, Appendix A, p. A-7); Appendix F, p. A-108). The trial judge denied defendant's motion for a directed verdict at the close of plaintiff's evidence (Appendix D, pp. A-55-8) and after all evidence was presented. (Appendix D, pp. A-64-7) Included as grounds for defendant's motions were that the evidence failed to show a direct loss by flood and the evidence established certain excluded perils under the policy, namely:

"Perils Excluded - This Company shall not be liable for loss: (a) by . . . (3) water, moisture, or mudslide damage of any kind resulting primarily from conditions, causes or occurrences which are solely related to the described premises or are within the control of the insured (including but not limited to design, structural or mechanical defects, failures, stoppages or breakages of water or sewer lines, drains, pumps, fixtures or equipment, seepage or backup of water, or hydrostatic pressure) or any condition which causes flooding which is substantially confined to the described premises or properties immediately adjacent thereto;

.

(d) by fire, windstorm, explosion, erosion, earthquake, landslide or any other earth movement except such mudslides as are covered under the peril of flood, or by theft;"

.....

(*West*, supra, p. 876, Appendix A, p. A-7-8, Appendix F, p. A-108).

After the verdict, the defendant again urged the aforementioned grounds in motions for judgment notwithstanding the verdict and for a new trial. Defendant's motions were denied. (Appendix G, pp. A-120-31). On appeal, the United States Court of Appeals for the Fifth Circuit reversed the judgment in favor of the Daigles and directed a verdict for the defendant by concluding that while there was sufficient evidence for the jury to find there was a direct loss by flood, the facts showed the immediate cause of the Daigles' loss was an earth movement which was not a mudslide. The Court said the policy did not cover earth movement in the form of soil settlement regardless of the role the flood played in causing that earth movement. (*West*, supra, pp. 876-78, Appendix A, pp. 8-12).

B. The West Case

The Wests purchased a four year old home located on an incline in the Bayou Vista subdivision near Morgan City in 1969 on a VA approved loan. (Appendix E, pp. A-70, 78-80) They purchased flood insurance in the amount of \$17,500 with a policy term of April 16, 1973, to April 16, 1974. (*West*, supra, p. 876, Appendix A, p. A-8 ; Appendix F, p.

A-117). At the time the Wests acquired their home they carefully inspected the home and found no structural defects, and they had not seen any evidence of cracking or structural damage for the four years prior to the 1973 flood, despite numerous wet and dry periods, minor flooding, and even a hurricane. (Appendix E, pp. A 72-5, 79-87).

The deluge of April 17 and 18, 1973, flooded the entire area including the area around the Wests' house. The water was waist deep in the street in front of the Wests' house and entered the Wests' house to a depth of one to two inches and remained standing there for a period of over 18 hours. (Appendix E, pp. A 69-71, 73, 77). Water damage to the floor tiles, walls, baseboards, and insulation and outside air conditioning unit was seen immediately. Structural damage was observable within two or three weeks after the flood, when a sliding glass door would not open, bricks began to separate from baseboards, a ridge appeared under the floor tiles and later an open crack developed where the ridge had been. (Appendix E, pp. A 73-7, 80-1).

Mr. Patterson, a Morgan City construction contractor, found the slab had cracked in several places and he opined the only feasible method of repair was to demolish the structure and rebuild a similar house. (Appendix E, pp. A-88-9). He testified that the house was adequately constructed for that area and met the standards for FHA and VA approval. (Appendix E, pp. A-90-1, 94) He said he would rebuild the house the same way as it had been built before (Appendix E, p. A-91), however he did state he might use a slightly larger slab because if the slab failed again because of flood he might be involved in the law suit. (Appendix E, pp. 98-9). Mr. Patterson clearly said the sudden structural damage was due

to area flooding. (Appendix E, p. A-90).

Dr. Capozzoli again testified that the flood had a negligible effect on the house, and that the structural damage was in progress at the time of flood and was due to the soil conditions and improper construction of the house. (Appendix E, p. A-101). He stated that the flood waters could have accelerated the settling of the soil under the house, but he could offer no explanation as why sudden cracking would occur immediately after the flood except to conclude that there was cracking in progress at the time of flood and the cracking was not observed by the Wests or others. (Appendix E, pp. A-102-3).

After hearing all the evidence the jury awarded the Wests the policy maximum of \$17,500 for "direct loss by flood" (See Appendix E, pp. A-104-5). Defendant's motions for a directed verdict, at the completion of plaintiff's evidence, (Appendix E, pp. A-100-1), and after all the evidence, were denied (Appendix E, pp. A-103-4). Also, defendant's motions for judgment notwithstanding the verdict and for a new trial were based on the same grounds as in the Daigles' case. These motions were similarly denied by the trial judge. (Appendix G, pp. A-120-31).

On appeal, the United States Court of Appeals for the Fifth Circuit reversed the jury award and remanded the case for trial on the amount of damages (less the \$200 policy deductible) caused by flood waters which entered the house. As in the Daigle Case, the Court concluded that the structural damage to the Wests' home was caused by earth movement other than mudslide. (*West*, supra, p. 878-79, Appendix A, pp. A-12-15). Since the defendant insurer in the West Case

had some liability, the Court then decided the issues raised on cross-appeal, namely the applicability of Louisiana's statutory law on attorney's fees and the appropriateness of prejudgment interest. Attorney's fees and penalties allowed under Louisiana law were found inapplicable; prejudgment interest was allowed. (*West*, supra, pp. 878-84, Appendix A, pp. A-15-26). Petitioners', West & Daigle, do not seek review of the Court's findings on those cross-appeal issues.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the United States Court of Appeals for the Fifth Circuit has violated the tenets of the Seventh Amendment to the United States Constitution by precluding the fact finding function of the jury in the West & Daigle cases. The Court of Appeals decision conflicts with rulings of the Supreme Court of the United States and other Circuit Courts of Appeals decisions.

Further, the Court of Appeals for the Fifth Circuit's narrow interpretation of the earth movement flood policy exclusion is unworkable, unconscionable and is directly contrary to the intent of the contracting policyholders, and to intent of the Congress which implemented a National Flood Insurance Program to protect American homeowners from the perils of flood.

Finally, that Court's interpretation of an insurance policy conflicts with decisions announced by the Supreme Court of the United States and other Circuit Courts of Appeals rulings.

A. Issue: Seventh Amendment Violation

The Court of Appeals for the Fifth Circuit is not free to

reexamine the jury's findings of fact in these cases; to do so violates the Seventh Amendment to the United States Constitution as stated:

"In Suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (U.S.C.A., Const. Amend. 7)

In the Daigle case, the Court of Appeals for the Fifth Circuit agreed that the evidence presented supported the jury's verdict that the flood caused the structural damage, but that Court presumes that the evidence showed how the flood caused the damage:

"This testimony was sufficient to support the jury's finding that the crack damage was a direct loss by flood. However, the plaintiff's proof also established *how* the flood caused this damage, and that proof brings into effect the policy's earth movement exclusion," (*West*, supra, p. 876, Appendix A, p. A-9).

The Court of Appeals for the Fifth Circuit came to a conclusion which is contrary to the factual evidence presented and the inferences to be drawn therefrom. The Court said:

". . . The house sank because the earth below it shifted and settled as a result of the loss of moisture in the soil. Regardless of whether this settlement had been in progress over a long period of

time or whether it occurred immediately after the flood and draining of the canals, it was still the result of earth movement . . . The policy does not cover loss caused by earth movement in the form of soil settlement. It unambiguously provides the *only* earth movement covered is a mudslide caused or precipitated by accumulation of water on or under the ground. There is no evidence of a mudslide in this record, nor is there evidence that the general surface of the ground area was unlevel . . ." (*West*, supra, p. 877, Appendix A, p. A-11).

Mrs. Daigle testified the rain stopped on the morning of April 18, 1973, (Appendix D, p. A-47) and she heard crackling sounds and noticed cracks almost immediately after the rain throughout the day of April 18th, (Appendix D, p. A-40) before the water had receded in the late afternoon of the 18th. (Appendix D, pp. A-48). The canals had been previously pumped out several times after heavy rains with no damage (Appendix D, pp. A-48-9) and defendant's expert, Dr. Capozzoli, testified that the pumping out of the canals would have no effect on the house (Appendix D, pp. A-61-2). It was reasonable for the jury to conclude that loss of moisture in the soil was not the initial cause of the damage, but that the heaving and cracking of the house was initially caused by the pressure and force of the flood waters acting on the foundation.

Mr. Guillory, an architectural engineer, who testified on behalf of the Daigles, concluded that the flood waters which floated the house aggravated the heaving and settling of the home. (Appendix D, pp. A-54-5). Because no appreciable settlement of the house had occurred for seven years pre-

viously, as evidenced by the lack of cracking, he concluded that the flood certainly had a direct effect on the structural damage to the house. (Appendix D, pp. A-52-4). Dr. Capozzoli was of the opinion that the house had appreciably settled before the flood and that cracking had occurred but was unnoticed. (Appendix D, pp. A-57, 59-62) He stated the flood had little effect on the resulting damage. However, he did observe that if there were no cracks before the flood and cracks after the flood, the flood was the cause. (Appendix D, pp. A-61-3)

The Court of Appeals for the Fifth Circuit did not believe, as the jury did, that the flood waters not only proximately caused the shifting of the earth below the house which resulted in structural damage, but also that the force and pressure of the flood waters caused the house to heave and crack initially. Once the loss was in progress, the receding flood waters and loss of moisture through evaporation and pumping would cause the structural damage to become more apparent.

Finally, as noted above, the Court of Appeals for the Fifth Circuit precludes the jury from finding that a mudslide had occurred. The Court's finding that there was "no evidence of a mudslide . . . nor is there evidence that the general surface of the ground area was unlevel..." (*West*, supra, p. 877, Appendix A. p. A-11) is *totally erroneous*. Dr. Capozzoli testified that a canal was located eight feet below the Daigles' house, (Appendix D, p. A-57), and Mrs. Daigle clearly testified her house was located at the top of an incline above the street (Appendix D, p. A-46); and that mud and debris were washed into the street in front of her house and her next door neighbor's house on the day after the flood. (Ap-

pendix D, pp. A. 49-50).

The Court of Appeals was bound to view the evidence in a light most favorable to the Daigles when they decided that a directed verdict or a judgment notwithstanding the verdict should have been granted as a matter of law. It is obvious that the Fifth Circuit did not give the Daigles the benefit of all inferences which the evidence supported, even though contrary inferences might be reasonably drawn. The jury weighs the credibility of witness and determines proximate cause. *Gunning vs. Cooley*, 281 U.S. 90, 50 S. Ct. 231, 24 L Ed 720 (1930); *Tennant vs. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 64 S. Ct. 409, 88 L Ed 520 (1944); *Lavender vs. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L Ed 916 (1946); *Wilkerson vs. McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L Ed 397 (1949); *Continental Ore Co. vs. Union Carbide and Carbon Corp.*, 370 U. S. 691, 82 S. Ct. 1404, 8 L Ed 2d 777 (1962); *Boeing Company vs. Shipman*, 411 F 2d 365 (5th Cir., 1969); *Garcia vs. Murphy Pac. Marine Salvaging Co.*, 476 F 2d 303 (5th Cir., 1973).

Plaintiffs' witness were clear that the Daigles' home did not crack independently of the flood waters. The jury could have rejected all or part of the expert opinions offered and could have concluded that because the Daigles' home had weathered many storms and wet and dry periods for seven years prior to the flood with no sinking, cracking, or other observable structural damage and that because cracking noises and observable structural damage occurred to the home immediately after the flood, the flood was the immediate cause of the loss.

In the *West* case, it is certain that the Court of Appeals

violated the jury's fact finding function by admitting that the flood water caused the damage and then precluding the jury from determining that the flood waters were the proximate cause of the loss:

" . . . In sum, the slab cracked because changes in the water table due to flooding and drainage of flood waters caused relative earth movements under the slab which created the positive and negative pressure which cracked it . . ." (*West*, p. 878, Appendix A, p. A-14)

The testimony of the Wests' clearly established that despite wet and dry periods, minor flooding, and even hurricanes for almost eight years prior to the flood, no structural damage had occurred to the house (Appendix E, pp. A72-5, 79-87). The Court of Appeals for the Fifth Circuit implied Mr. Patterson testified relative earth movements caused the damage, but that Court admits they did not clearly appreciate Mr. Patterson's testimony as to how the foundation failed. (*West*, supra, p. 878, Appendix A, p. A-13-4). Nowhere has Mr. Patterson said that changes in the water table caused relative earth movements which cracked the slab, nor does he agree with Dr. Capozzoli that lack of soil support caused the foundation to settle unevenly and crack. (Appendix E, pp. A-88-99). He only attributed the structural damage to flooding. (Appendix E, p. 90). Dr. Capozzoli dismissed the flood by concluding it had a negligible effect on the house, but again he could offer no explanation as to why sudden cracking would occur shortly after the flood, except to say the cracks were just not observed. (Appendix E, pp. A-101-3). Finally, any earth movement which may have occurred with the flood could be classified as a mudslide since the

Wests' house was located on an incline up the side of a hill and mud and sediment were found inside the house. (Appendix E, pp. A-70-73, 79-80) It is therefore very clear that there was sufficient evidence for the jury to infer that the flood waters were the immediate cause of the cracking damage to the house. And, even if earth movement was a contributing cause to the loss, the earth movement itself was immediately and concurrently caused by the flood waters. The structural damage would not have occurred except for the immediate and direct presence of the flood waters.

After hearing the evidence in both the West and Daigle Cases, the trial judge denied defendant insurer's motions for directed verdict and a judgment notwithstanding the verdict, stating:

"We conclude that there was sufficient evidence under *Boeing Co. v. Shipman*, supra, to go to the jury on both the issues of direct loss because of flood and damage substantial as a proximate result of flood." (Appendix G, pp. A-123, 128).

In denying defendant insurer's motion for a new trial in both cases, the trial court considered the Seventh Amendment precepts:

"This constitutional provision obviously cannot be applied so as to foreclose any scrutiny of a jury's fact findings; it expressed, however, in clear terms the principle that facts once found by a jury in the context of a civil trial are not to be re-weighed and a new trial granted lightly. The standard adopted by the Fifth Circuit is that the district court should

not grant a new trial motion unless the jury verdict is 'at least against the great weight of the evidence.' *Cities Service Oil Company v. Launey*, 403 F.2d 537 at 540 (5th Cir., 1968). A rule which would permit a court to grant a new trial when the evidence, the Fifth Circuit said, 'would destroy the role of the jury as the principal trier of the facts and would enable the trial judge to disregard the jury's verdict at will.' Applying the test enunciated in *Cities Service*, we must decline to grant a new trial." (Appendix G, pp. A-124, 128-9).

B. Issue: Flood Policy Interpretation

The Court of Appeals for the Fifth Circuit erred in its holding that any earth movement other than mudslide also excluded structural damage proximately caused by flood waters. That Court limits the causation of earth movement *only* to mudslide as well as defining earth movement as meaning soil settlement:

"In unambiguous terms," the Court said, "the policy provides that the defendant 'shall not be liable for loss . . . by . . . erosion, earthquake, landslide, or any other earth movement except such mudslides as are covered under the peril of flood . . .'. The policy does not cover loss caused by earth movement in the form of soil settlement. It unambiguously provides that the only earth movement covered is a mudslide caused or precipitated by accumulation of water on or under the ground." (*West*, p. 877, Appendix A, p. A-17).

This strained construction of a flood insurance policy was not the intent of Congress, the Secretary of Housing & Urban Development or the insured. *The intent of the "earth movement" policy exclusion was to exclude earthquake, landslide, and other like earth movement, all of which are similar in origin or causation, i.e., tectonic or volcanic. Earth movement which occurs independently in nature from flood is excluded, not earth movements and mudslides caused or precipitated by flood waters.* Earth movement as a policy exclusion is limited in its meaning to the same general kind and class of perils which immediately preceded it, under the common law doctrine of *ejusdem generis*. *Black's Law Dictionary*, (4th Ed, 1968, p. 608); *Gullett vs. St. Paul Fire & Marine Ins. Co.*, 446 F.2d 1100 (7th Cir., 1971); *Anderson vs. Indiana Lumbermens Mutual Ins. Co.*, 127 So2d 304 (La. App. 1961).

Nowhere in the policy, statute code of federal regulations and legislative history is there stated that structural damage proximately caused by general flooding condition is excluded. In the Code of Federal Regulations "Limitations on Coverage," 24 C.F.R. 1911.4(C), there is a statement that the policy does not cover damage from landslide or from earthquake or *similar earth movement* which are *volcanic or tectonic in origin*. (Appendix C, p. A-34) The regulations further state that the policy does not cover "losses caused by land slippage rather than mudslide" and then directs the reader to 24 C.F.R. 1909.1, (Appendix C, pp. A-34-5). There, under the definition of "mudslide" is found the limited contrasting statement that "a mudslide (i.e.) mudflow may occur as a distinct phenomenon while a landslide is in progress . . ." 24 C.F.R. 1909.1, (Appendix C, p. A-33). The only references to earth movement in the code

of federal regulations, The National Flood Insurance Act or legislative history of the Act is the limited classification of landslides and earthquakes which are volcanic in origin.

Nowhere in the flood policy, code of federal regulations and the Act is there any mention of an exclusion for soil settlement! *And there is certainly no reference to flood related soil settlement as an exclusion!* The Code of Federal Regulations reveals only that the policy does not cover erosion which is *not* flood related, 24 C.F.R. § 1909.1, (Appendix C, p. A-33), 24 C.F.R. § 1911.4 (C), (Appendix C, pp. A-34-5) Damage from the *pressure* or weight of ice and water is covered when the loss occurs as a part of flood, 24 C.F.R. § 1911.4(C), (Appendix C, p. A-34). Damage by hydrostatic pressure or seepage resulting from a general flooding condition was intended to be covered (See Perils Excluded, A-3, under the policy of flood insurance, Appendix F. p. A-108; and see 24 C.F.R. § 1911.4(C), Appendix C, p. A-34)

Congress declared that flood insurance coverage for residential properties was a priority, 42 USCA § 4012(a) (Appendix B, p. A-31). Protection from flood waters was the first purpose of the Act. (See 1968 *U.S. Code Cong. & Adm. News*, pp. 2966-7, 3026; Appendix I, pp. A-141-8). Flood insurance is now required on homes in flood prone areas when the home is built or improved with money borrowed from federally insured lending institutions 42 U.S.C.A. 4012a, Appendix B, pp. A-32a & b) Mudslide coverage was added by amendment in 1969 as an additional purpose. The additional protection provided by mudslide coverage was certainly not intended to limit the losses caused by flood waters! (See 1973 *U.S. Code Cong. & Adm. News*, pp.

3228-9, *infra.*). It is evident that mudslides are "... related in cause and similar in effect to that which results directly from storms, deluges, overflowing waters, and other forms of flooding ... the problems involved in providing protection against this damage and loss ... are similar to those ... caused by other forms of flooding ..." 42 USCA § 4001(f) (Appendix B, pp. A-29-30) Congress intended earth movement caused by flood to be covered as is seen in the legislative history of the National Flood Insurance Act below:

"DEFINITION OF 'FLOOD' "

Section 107 of the bill, which is identical with Section 108 of the House bill as reported, would amend the mudslide definition of Section 1370(b) of the National Flood Insurance Act of 1968 by making clear that losses or damage resulting from mudflows will be paid, regardless of whether there may already have been a landslide in progress that might affect the insured property.

The committee is aware of the difficulties the Federal Insurance Administration has encountered in differentiating mudslides, which the Act covers, from landslides, which are not covered. Because of those difficulties, and on the basis of extensive investigation and advice from technical experts on the subject, FIA has chosen to interpret the word mudslide to mean mudflow: namely, a condition where there is actually river, or flow, or "liquid mud" down a hillside, usually as a result of a dual condition of loss of brush cover and subsequent heavy rains. Such occurrences are unforeseeable, are less common than earth movement

from landslide or erosion, and generally have characteristics markedly similar to those of a flood. Clearly, the committee intended this condition to be covered when it added the mudslide amendment to the Act in 1969.

What had been unclear, however, is whether FIA had consistently provided mudflow coverage in situations where the mudslide was preceded or accompanied by a slow or gradual movement of the earth, sometimes caused or aggravated by the improper use of fill in the construction of new subdivisions which had already endangered the insured property, and would ultimately result in its destruction, whether or not a mudflow occurred. There have been indications that where a landslide was already in progress at the time the insured obtained coverage, FIA may refuse to pay the claim for a subsequent loss, even if a mudflow actually occurred.

The amendment added by the committee is intended to make clear that, just as FIA would be required to pay sudden flood loss that occurred to an insured property while a gradual landslide was in progress, so too it is expected to pay for mudflow losses that occur unexpectedly while a landslide is in progress, so long as the mudflow and not the landslide is the *proximate cause*, or *sine qua non*, without which the damage claimed would not have occurred..." 1973 U.S. Code Cong. & Adm. News, pp. 3228-9 (emphasis supplied).

Congress certainly intended coverage for the primary peril of flood waters as well as the added peril of mudslide, when the flood "... was preceded or accompanied by a slow movement of earth . . .," if the flood waters were the proximate cause of the damage.

In insurance cases the "proximate cause" of the loss is the efficient cause and not merely an incidental cause which may be nearer to the resulting damage. *Aetna Insurance Company vs. Boon*, 95 U.S. 117, 24 L.Ed 395 (1877); *Lanasa Fruit Steamship & Importing Co. vs. Universal Ins. Co.*, 302 U. S. 556, 58 S. Ct. 371, 82 L Ed 422 (1938); *Norwich Union Fire Ins. Soc. vs. Board of Commissioners*, 141 F 2d 600 (5th Cir., 1944); *Dubugue Fire and Marine Insurance Company vs. Caylor*, 249 F 2d 162 (10th Cir., 1957). When the flood water peril insured against is the proximate cause of the loss, as was determined by the jury, there should be recovery, notwithstanding the earth movement peril outside the policy which remotely and incidentally contributed to the loss. *Jackson vs. National Flood Insurers Assoc.*, 398 F. Supp. 1383 (S.D., Tex, 1974); *Cincotta vs. National Flood Insurers Assoc.*, No. 75-C-1833 (DC, NY, 1977, Unreported; reproduced as Appendix H, pp. A-135-40); 5 *Appleman, Insurance Law Practice* § 3083 (1970).

The Court of Appeals for the Fifth Circuit is obligated to construe the earth-movement-except-mudslides exclusion as the contracting parties would have expected it to be construed. The Court of Appeals for Fifth Circuit has stated that standard insurance law principals govern the construction and effect of flood insurance principles (*West*, supra, p. 881, Appendix A, p. A-20); *Drewett vs. Aetna Casualty & Surety Co.*, 539 F.2d 496 (5th Cir., 1976); *Summers vs.*

Harris, 573 F 2d 869 (5th Cir., 1978). With regard to policy exclusions, it is well established law that if such policy provisions are not clearly expressed, they will be construed strictly against the insurer and in favor of the insured. *Ashenbrenner vs. U. S. Fidelity & Guaranty Co.*, 292 U.S. 80, 54 S. Ct. 590, 78 L Ed 1137 (1934); *Hartford Steam Boil Inst. I. Co. vs. Schwartzman Pack. Co.*, 423 F.2d 1170 (10th Cir., 1970); *Calcasieu Marine Nat. Bank vs. Am. Emp. Ins.* 533 F 2d 290 (5th Cir., 1976); *Mason vs. National Flood Insurance Assoc.*, 361 F Supp 939 (D.C., Haw., 1973). An exclusion must be specific to be meaningful. If the drafters of the flood insurance policy intended the earth movement exclusion to include all earth movement, including earth movement caused by flood, they should have so said; the courts can not rewrite the contract. *Phoenix Ins. Co. vs. Slaughter*, 12 Wall 404, 20 L Ed 444 (1871); *Feeney and Meyers vs. Empire State Ins. Co.*, 228 F 2d 770 (10th Cir., 1955). If earth movement is intended to mean flood-related "earth settlement" or "earth sinking" the insurance policy is sufficiently ambiguous to be construed in favor of the insured, *Souza vs. Corvick*, 941 F 2d 1013 (10th Cir., 1970).

Finally, it is virtually impossible to conceive of a general flooding condition where there is not earth movement. Flood itself is defined in the policy as the partial or complete inundation of normally dry land areas, (Appendix F, p. A-108). Since earth movement accompanies or results from almost all flood waters, particularly when buildings are structurally damaged, almost all structural damage in flat land areas would be excluded as a loss caused by "earth movement other than a mudslide"! Under the United States Court of Appeals for the Fifth Circuit's decision

herein, the peril of mudslide would be covered, but the peril of earth movement caused by flood waters would not be covered. And, if the Federal Insurance Administration had difficulty in distinguishing mudslide from landslide, it would be impossible for the FIA to distinguish between a mudslide preceded or accompanied by earth movement caused by flood! Both perils, "mudslide" and "flood caused earth movement" would have similar characteristics in cause i.e., overflow of water and mud, and similar characteristics in effect, i.e., soil subsidence. The administrative and judicial resolution of this vicious circle would be arbitrary at best! Thus, the ruling of the Court of Appeals for the Fifth Circuit is unenforceable and it has been well settled that meaning and effect should be given to the whole contract; a construction which neutralizes any provision of a contract should never be adopted if the contract can be interpreted to give effect to all provisions. *Looney vs. Great American Ins. Co.*, 71 F.R.D. 211 (1976); 12 *Appleman, Insurance Law & Practice* § 7383 (1976); *Restatement of Contracts* § 236 (1932).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals of the Fifth Circuit.

RESPECTFULLY SUBMITTED,

LEOPOLD B. BABIN
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CERTIFICATE

I certify that three copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been mailed to Mr. P. A. Bienvenu, 1414 American Bank Building, New Orleans, Louisiana, 70112, first class, postage prepaid, and three copies of this Petition have been mailed to the Solicitor General, Department of Justice, Washington, D.C., 20530, air mail, postage prepaid, all in accordance with Rule 33.

Houma, Louisiana, this 19th day of December, 1978.

LEOPOLD B. BABIN

DEC 20 1978

MICHAEL BODAK, JR., CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM,

NO. **78-1001**

CARL D. WEST, Petitioner

Versus

PATRICIA ROBERTS HARRIS, SECRETARY OF
THE UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,
Respondent.

and

ANDREW J. DAIGLE, Petitioner

Versus

PATRICIA ROBERTS HARRIS, SECRETARY OF
THE UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

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APPENDIX A

WEST v. HARRIS, 573 F2d 873 (1978)

Carl D. WEST,
Plaintiff-Appellee-Cross-Appellant,

v.

Patricia Roberts HARRIS, Secretary of the United States
Department of Housing and Urban Development,
Defendant-Appellant-Cross-Appellee.

Andrew J. DAIGLE,
Plaintiff-Appellee-Cross-Appellant,

v.

Patricia Roberts HARRIS, Secretary of the United States
Department of Housing and Urban Development,
Defendant-Appellant-Cross-Appellee.

No. 76-2531

United States Court of Appeals, Fifth Circuit

May 26, 1978

Rehearing Denied July 28, 1978

Insureds brought action against insurers to recover under
policies issued under the National Flood Insurance Act. The
United States District Court for the Western District of

Louisiana, Edwin F. Hunter, Jr., J., entered judgment on the verdicts in favor of insureds and insurers appealed. Insureds filed cross appeal seeking awards of penalties, attorneys fees, and prejudgment interest. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) evidence demonstrated that, with the exception of water damage suffered by one insured, damage to insureds' homes was due to earth movement which was not a "mudslide" and thus was due to a peril which was excluded from coverage under the policies; (2) whether the jurisdiction of federal court was based on the grant of jurisdiction in the Act or was based on diversity of citizenship, federal law applied as to the recoverability of penalties, attorneys fees, and prejudgment interest; (3) as a matter of federal law, prejudgment interest should be awarded, and (4) as a matter of convenience and practicality, interest should be determined at the rate allowed by the law of the forum state.

Reversed and rendered in part and remanded in part.

1. Insurance - 429.1(3)

Evidence that, following a 12 to 14-inch rainfall which caused flooding conditions in the city, which caused flood-water to rise to waist level in the street in front of the insureds' home, and which caused the water to reach a point approximately half the distance between the street and the house, the insureds noticed cracks in the walls of their home which continued to increase in size following the inundation sustained determination that the cracks in the home were a direct loss caused by flood for purposes of policies issued under the National Flood Insurance Act. National Flood Insurance Act of 1968, § 1302 et seq., 42 U.S.C.A. § 4001 et seq.

2. Insurance - 429.1(3)

Evidence that, during heavy rainfall, soil surrounding insureds' home became supersaturated with moisture which caused the home to heave or rise slightly, and that a drainage canal behind the home was then drained rapidly, which caused the soil to dry and the house to settle unevenly, causing cracking in the slab, sheetrock and masonry of the home, demonstrated that the damage to the structure was caused by earth movement which was not a "mudslide" so that the damage fell within a peril excluded from coverage under a policy issued under the National Flood Insurance Act. National Flood Insurance Act of 1968, § 1302 et seq., 42 U.S.C.A. § 4001 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

3. Contracts - 176(2)

Determination of the legal operation of unambiguous language of a contract is a function for the court and not the jury.

4. Insurance - 429.1(3)

Testimony by contractor that the best way to repair structural damage to insureds' home was to demolish the house and slab and rebuild a similar house upon a stronger slab, that the failure of the foundation was due to flooding of the area, and that the soil surrounding the home shrank as the water table lowered, thus causing the house to drop, demonstrated that structural damage was due to earth move-

ment other than a "mudslide" and thus was caused by a peril excluded from coverage under a policy issued under the National Flood Insurance Act. National Flood Insurance Act of 1968, § 1302 et seq., 42 U.S.C.A. § 4001 et seq.

5. Federal Courts - 419

Regardless of whether federal court had jurisdiction in action to recover under policy issued under the National Flood Insurance Act on the basis of diversity of citizenship or on the basis of the jurisdictional grant contained in the Act, the interest in uniformity of decision under the Act mandated the application of federal, rather than state law, with respect to the right to recover penalties, attorneys fees, and pre judgment interest. LSA--R.S. 22:658; National Flood Insurance Act of 1968, § 1333, 42 U.S.C.A. § 4053; 28 U.S.C.A. § 1332.

6. Interest - 39(2)

United States - 110

Award of prejudgment interest in action brought under the National Flood Insurance Act is required as a matter of federal law; fact that the government has a financial stake in the program is not sufficient to clothe the private insurer with the role of sovereign immunity from awards of interest. National Flood Insurance Act of 1968, § 1302 et seq., 42 U.S.C.A. § 4001 et seq.

7. United States - 110

Generally, the United States is not liable for interest except where the liability is imposed by statute or assumed by contract.

8. Interest - 39(2)

Prejudgment interest is awarded when necessary to compensate an injured plaintiff; it is not allowed when it is not necessary element of compensation.

9. Interest - 31

As a matter of convenience and practicality, the amount of prejudgment interest awarded in an action under the National Flood Insurance Act should be determined at the rate allowed by the law of the forum state. National Flood Insurance Act of 1968, § 1302 et seq., 42 U.S.C.A. § 4001 et seq.

Robert Kopp, Atty., Marta W. Berkley, Atty., Civil Div., Dept. of Justice, Washington, D.C., P. A. Bienvenu, P. Albert Bienvenu, Jr., Bienvenu, Foster, Ryan & O'Bannon, New Orleans, La., for defendant-appellant cross-appellee.

Leopold B. Babin, Houma, La., for plaintiff-appellee cross-appellant.

P. Albert Bienvenu, Jr., P. A. Bienvenu, Bienvenu, Foster Ryan & O'Bannon, New Orleans, La., for National Flood Insurers Association (original defendant).

Appeals from the United States District Court for the Western District of Louisiana.

Before CLARK and GEE, Circuit Judges, and LYNNE*, District Judge.

*Senior District Judge of the Northern District of Alabama, sitting by designation.

CHARLES CLARK, Circuit Judge:

These cases both involve claims by insureds under policies of flood insurance issued pursuant to the National Flood Insurance Act of 1968, 42 U.S.C.A. § 4001 et seq. After a consolidated trial Andrew J. Daigle won a jury verdict against the National Flood Insurers Association in the amount of \$12,084.56, and Carl D. West won a verdict in the amount of \$17,500.00, the policy limit. Judgment was entered pursuant to the verdicts, but on post-trial motion the amount of each judgment was reduced by the \$200 policy deductible. On appeal the National Flood Insurers Association¹ contends (1) that the trial judge should have granted defendant's motions for directed verdict and for judgment notwithstanding the verdict since the evidence was insufficient to show that the damage was a direct loss by flood; (2) that the trial judge should have granted defendant's motions for directed verdict and for judgment notwithstanding the verdict since the undisputed evidence established that the damage resulted from a peril which the policies excluded from coverage; (3) that the jury awarded damages for items not covered by the policies; and (4) that the trial judge committed reversible error in instructing the jury. On cross-appeal the plaintiffs raise additional issues involving the recoverability of a penalty and attorney's fees provided by Louisiana insurance law

1. On April 5, 1978, over two months after oral argument in this case, Patricia Roberts Harris, Secretary of the Department of Housing and Urban Development (HUD), was substituted as party-appellant in the place of the National Flood Insurers Association. The Department of HUD assumed the operation of all of the insurance aspects of the flood insurance program previously performed by the National Flood Insurers Association on January 1, 1978. In conjunction with this undertaking, HUD agreed to assume responsibility for the continuation of coverage under policies previously issued by the Association, including the defense of pending claims asserted pursuant to such policies. This change in parties has no effect on the rights of these plaintiffs under the policies issued to them.

and the recoverability of prejudgment interest. We reverse both cases and remand the West case for new trial on the issue of damages only.

Since these decisions turn on the terms of identical policies of insurance issued to the plaintiffs by the defendant, we will set forth those terms with some particularity. Upon the payment of a premium by the plaintiffs, the defendant agreed to insure the plaintiffs' homes in the Morgan City, Louisiana, area "against all DIRECT LOSS BY 'FLOOD' as defined herein . . ." The policy defined "flood" as follows:

Wherever in this policy the term "flood" occurs, it shall be held to mean a general and temporary condition of partial or complete inundation of normally dry land areas from (1) the overflow of inland or tidal waters, (2) the unusual and rapid accumulation or runoff of surface waters from any source, or (3) mudslides which are caused or precipitated by accumulations of water on or under the ground.

Immediately below this definition was a "Perils Excluded" provision:

Perils Excluded -- This Company shall not be liable for loss:

(a) by . . . (3) water, moisture or mudslide damage of any kind resulting primarily from conditions, causes or occurrences which are solely related to the described premises or are within the control of the Insured (including but not limited to design, structural or mechanical defects, failures, stoppages or breakages of water or sewer lines, drains, pumps, fixtures or equipment, seepage or backup of water, or hydrostatic pressure) or any condition which causes flooding which is substantially confined to the described

premises or properties immediately adjacent thereto;

.....

(d) by fire, windstorm, explosion, erosion, earthquake, landslide or any other earth movement except such mudslides as are covered under the peril of flood, or by theft;

.....

The Daigle policy had a term of March 31, 1973, to March 31, 1974, and the West policy had a term of April 16, 1973, to April 16, 1974.

The Daigle Case

The plaintiff's evidence in the Daigle case showed that the Daigles had purchased their house new in 1966. The house had a slab foundation and was built on reclaimed swamp land. The soil prevalent throughout this area is a mixture of humus and clay which expands when wet and contracts when dry. These soil movements cause houses built on slabs to heave and settle slightly with soil moisture changes. Despite numerous wet and dry periods during the seven years before April 17-18, 1973, the Daigles noticed no structural damage to their house. During that time, however, they had found it necessary on occasion to purchase dirt fill for use in landscaping, gardening, and repairing "pot holes" which had developed in their yard.

On April 17-18, 1973, a twelve - to fourteen-inch rainfall inundated the Morgan City area. That rainfall caused flooding conditions in many sections of Morgan City, and the flood water was waist-deep in the street in front of the

Daigles' house. The water reached a point approximately half the distance between the street and their house, the highest it had risen since they bought the house, but the flood waters never entered their house. Following this rainfall a severe drought occurred which lasted through August.

Mrs. Daigle testified that they noticed damage to their house almost immediately after the rainfall. They first heard cracking sounds, and then they observed small cracks in the walls that got bigger and bigger as time went by. Mr. Shumaker, a construction contractor who inspected the house in July 1973, confirmed that the cracking had occurred only a few months earlier, and Mr. Guillory, an architectural engineer, opined that "the flooding certainly had a direct effect on the matter."

[1] This testimony was sufficient to support the jury's finding that the crack damage was a direct loss by flood. However, the plaintiff's proof also established *how* the flood caused this damage, and that proof brings into effect the policy's earth movement exclusion.

[2] According to Mr. Guillory and Mr. Shumaker, the normal situation in Morgan City is for water to be kept in the drainage canals around Morgan City to maintain the water table for the sole purpose of stabilizing the soil. During the heavy rainfall of April 17-18, the soil became super-saturated with moisture, which caused the Daigles' house to heave, or rise, slightly. The municipal authorities became alarmed at the water accumulation in the canals, one of which was behind the Daigles' house, and they determined to drain the canals as rapidly as possible. The rapid draining of the canals lowered the water table quickly, with the result that the soil dried and the house settled unevenly, causing

cracking in the slab, sheetrock, and masonry of the Daigle house.

Dr. Capozzoli, the soil expert who testified for the defendant, agreed that the drying of the soil caused the earth to sink and settle, and that in turn caused the damage to the Daigles' house. He differed from Mr. Guillory, however, about the effect the flood and its aftermath had on this process. Dr. Capozzoli was of the opinion that the settlement was in process before the flood due to the nature of the soil and that the flood played no more than a negligible role in causing the damage to the house. He did admit, however, that had a professional inspected the house immediately before the flood and found no cracks, and reinspected it immediately after the flood and found cracks, he would agree that the flood was a causative factor.

At the end of the plaintiff's evidence and again at the close of all the evidence, the defendant moved for a directed verdict both on the ground that the evidence failed to establish that the plaintiff's damage was a direct loss by flood and on the ground that the evidence established the applicability of several of the policy exclusions, including exclusion of all earth movement except mudslides. The trial judge, being of the opinion that the separate contentions as to coverage and exclusion were merely two sides of the same coin, denied the motion and submitted the case to the jury to determine whether the plaintiff suffered a direct loss by flood. The defendant renewed these contentions on motion for judgment notwithstanding the verdict, which the trial court denied. This action was error. The evidence entitled the defendant to judgment as a matter of law in the Daigle case.

[3] The determination of the legal operation of the un-

ambiguous language of a contract is a function for the court and not the jury. *Nat Harrison Associates, Inc. v. Gulf States Utilities Co.*, 491 F.2d 578 (5th Cir. 1974); *Gore v. American Motorists Insurance Co.*, 441 F.2d 10 (5th Cir. 1971); see *Ammons v. Franklin Life Insurance Co.*, 348 F.2d 414 (5th Cir. 1965). In this case the undisputed facts show that the immediate cause of the Daigles' loss was earth movement which was not a mudslide, a peril excluded in unambiguous terms under clause (d) of the "Perils Excluded" section of the policy.

Regardless of the role the flood of April 17-18 played in bringing about the conditions that led to the damage of the Daigles' house, the testimony of Mr. Shumaker, Mr. Guillory, and Dr. Capozzoli established without contradiction that the immediate cause of the damage was the settlement of the house due to uneven soil support. The house sank because the earth below it shifted and settled as a result of loss of moisture in the soil. Regardless of whether this settlement had been in process over a long period of time or whether it occurred immediately after the flood and draining of the canals, it was still the result of earth movement.

In unambiguous terms the policy provides that the defendant "shall not be liable for loss . . . by . . . erosion, earthquake, landslide or any other earth movement except such mudslides as are covered under the peril of flood . . ." The policy does not cover loss caused by earth movement in the form of soil settlement. It unambiguously provides that the only earth movement covered is a mudslide caused or precipitated by accumulation of water on or under the ground. There is no evidence of a mudslide in this record, nor is there evidence that the general surface of the ground area was unlevel. The only mention of a mudslide was Mr. Guillory's

definition of the term as mud sliding down an incline on the surface of the earth. Cf. 24 C.F.R. § 1909.1 (1977) (defining "mudslide" as a "flow . . . of liquid mud down a hillside . . .").

Since the Daigles' loss occurred in a manner that the policy clearly excluded from coverage, there was no issue of fact to be submitted to the jury. The trial court should have applied the policy exclusion to the undisputed evidence and directed a verdict for the defendant. We therefore reverse the judgment in favor of Mr. Daigle and direct the rendition of a verdict for the defendant.

The West Case

This case was consolidated with the Daigle case for trial and both cases were simultaneously submitted to the same jury. The jury found that the Wests had sustained a direct loss to their property because of flood and awarded them the policy limit. Because of the different facts proved in this case, we sustain the liability portion of the judgment but reverse the award of damages.

According to Mr. West's testimony, the Wests purchased a four-year-old house in 1969. This house was in a different neighborhood from the Daigles' house. However, the testimony revealed that it too was built on reclaimed swamp land and was supported by a clay-humus mixture soil foundation that would expand and contract with soil moisture changes. At the time of purchase the Wests inspected the house thoroughly and found no evidence of cracks, defects, or structural damage, and they observed no such damage prior to the rainfall of April 17-18, 1973.

During this rainfall, flood water inundated the Wests' property and actually entered the house to a depth of one and one-half inches. Water damage to the floor tiles, air conditioning unit, wall boards, baseboards, and insulation was immediately apparent. Structural damage to the Wests' house became apparent two to three weeks after the flood: a sliding glass door began to jam, bricks began to pull away from the baseboard, a ridge appeared under floor tiles, and later an open crack in the floor appeared. Inspection of the house revealed that the concrete slab foundation had cracked in several places. Although the defendant apparently was willing to pay the Wests for the water damage, it denied coverage of the structural damage.

[4] The major component of the structural damage was the cracking of the house's slab foundation. Mr. Patterson, a construction contractor who testified on behalf of the plaintiff, was of the opinion that repairing the existing structure would provide a temporary cure at best. He recommended and gave an estimate, which exceeded the policy limits, for demolishing the house and slab and rebuilding a similar house on a stronger or "beefed-up" slab. Mr. Patterson also attributed the failure of the foundation to the flooding of the area. A fair reading of his testimony, however, reveals that the structural damage to the Wests' house was also caused by earth movement other than a mudslide, thus bringing into play the same policy exclusion which applies in the Daigle case.

Although Mr. Patterson's testimony about how the flood caused the foundation to fail was not as clear as Mr. Guillory's testimony in the Daigle case, the gist of the testimony is the same. He testified that lowering the water table causes the soil to shrink, as a result of which the house drops down.

He testified that the concrete slab supporting the Wests' house obviously sank in some areas because of the condition of the soil. The reason he wanted to "beef up" the slab of a new house was so that it could withstand any "positive negative pressure that may occur in any future flooding situation." In sum, the slab cracked because changes in the water table due to flooding and drainage of flood waters caused relative earth movements under the slab which created the positive and negative pressures which cracked it. The new stronger slab was required to resist similar forces in the future.

Dr. Capozzoli again testified for the defendant, and he concluded that the structural damage had been caused by soil movements and not by the flood. Although Dr. Capozzoli and Mr. Patterson differed as to the role the flood played in damaging the Wests' house, they were in agreement that lack of soil support caused the foundation to settle unevenly and crack.

The defendant moved for a directed verdict at the end of the plaintiff's case and again at the close of all the evidence on the ground, among others, that the evidence established the applicability of the provision excluding coverage of loss due to earth movement other than a mudslide. The trial judge denied these motions, and he later denied the defendant's motion for judgment notwithstanding the verdict, which was also made, in part, on the basis of this exclusion.

The trial judge erred in denying these motions, for the evidence presented by both sides established the immediate cause of the structural damage to have been earth movement other than a mudslide. As was discussed in the Daigle

case, the policy clearly excludes such losses from its coverage, and the trial judge should have directed a verdict for the defendant insofar as the plaintiff was seeking to recover for structural damages.

Since the flood water entered the house and did some damage to the interior of the West home and to its contents, it is clear that the defendant has some liability under the policy it issued. However, the jury's award of \$17,500 was based on Mr. Patterson's estimate of the cost to destroy the existing house and slab and to rebuild a similar house on a "beefed-up" slab, a procedure necessitated only by the cracking of the original slab. We reverse that verdict since the award was incorrectly based on the structural damages to the house and remand for a new trial on the issue of the amount of damages (less the \$200 policy deductible) caused by the flood waters that entered the house.

The Cross-Appeal

Since the defendant insurer does have some liability in the West case, we must consider the issues raised on cross-appeal concerning the applicability of Louisiana statutory law which allows a penalty and attorney's fees for the arbitrary refusal of an insurer to pay a claim, La.Rev.Stat. Ann. 22:658, and the availability of prejudgment interest to a prevailing plaintiff in an action brought on a flood insurance policy. The plaintiff argues that the state law provision on the penalty and attorney's fees is applicable in a diversity case on a flood insurance policy because the provision is not inconsistent with but in fact is harmonious with the federal scheme since it facilitates the prompt settlement of claims. The plaintiff argues that prejudgment interest is allowable both because Louisiana law allows prejudgment

interest in such cases and because equity and general contract law support an award of such interest. The district court, though inclined to hold that the defendant had not acted arbitrarily or capriciously, denied the plaintiff's claims for the penalty and attorney's fees as a matter of law and also denied the plaintiff's claim for prejudgment interest. We affirm the judgment denying the penalty and attorney's fees and reverse the judgment denying prejudgment interest.

Whether the plaintiff is entitled to the penalty and attorney's fees granted by Louisiana statute turns on the fact that federal law is applicable in flood insurance cases. Mr. West originally filed this action in Louisiana state court against Aetna Casualty and Surety Company, the servicing agent of the National Flood Insurers Association with respect to the West policy. Although Congress granted jurisdiction in cases involving denials of claims under flood insurance policies to United States district courts without regard to diversity of citizenship or amount in controversy, 42 U.S.C.A. § 4053, Aetna removed this case to federal district court on the basis of diversity jurisdiction, alleging diversity of citizenship and over \$10,000 in controversy, 28 U.S.C.A. § 1332. Subsequently the National Flood Insurers Association was added as a party defendant and still later Aetna was granted summary judgment. The plaintiff argues that since this case is in federal court on the basis of diversity jurisdiction, the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), compels the court to apply state law.

We pretermitt any determination of whether the district court exercised its jurisdiction under the diversity statute or under 42 U.S.C.A. § 4053. Although the basis for removal pleaded by Aetna, who turned out not to be the

proper defendant, was diversity jurisdiction, the fact remains that Congress granted jurisdiction in disputes over the coverage of insurance policies issued pursuant to the National Flood Insurance Act to federal district courts without regard to diversity of citizenship or amount in controversy. We need not resolve whether the application of state or federal law should be determined by which of two jurisdictional statutes a party chooses to allege in invoking the court's jurisdiction, for even if this properly should be considered a diversity case federal law applies.

The National Flood Insurance Act of 1968 makes flood insurance available through a program with large-scale participation by the federal government and carried out to the maximum extent practicable by the private insurance industry. 42 U.S.C.A. § 4001(b), (d). Besides making insurance available in high-risk, high-rate areas, the Act also contemplates a unified national program for flood-plain management in order to reduce or avoid future flood losses. 42 U.S.C.A. §§ 4001(c), 4002(b). Thus, flood insurance is only available in those areas which have adopted land use and control measures conforming to federal criteria. 42 U.S.C.A. § 4012(c), 4102.

The Secretary of HUD is authorized to establish and administer the flood insurance program. 42 U.S.C.A. § 4011. The Secretary's involvement in the program was summarized by the Third Circuit in *Commonwealth of Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975), as follows:

. . . [T]he Secretary is authorized to determine the priorities for insurance coverage, the manner in which insur-

ance premiums are to be set, the mechanics of funding, the methods of paying claims, the limitations on payments and on the total amount of outstanding coverage, and the extent of federal financial subsidies for the insurance premiums. See 42 U.S.C. §§ 4012-4027; 1968 U.S. Code Cong. & Admin. News pp. 2967-73.

Under the Act, 42 U.S.C. § 4041, the Secretary is first directed to implement the program by encouraging the formation of a pool of private insurance companies. The Secretary is then authorized to enter into an agreement with this insurance pool to make flood insurance policies available to the public with premiums subsidized by federal funds. 42 U.S.C. §§ 4041, 4051, 4052. The members of the insurance pool are to sell the insurance, adjust and pay claims and provide risk capital. 42 U.S.C. §§ 4052, 4053. The Secretary is authorized to make payments to the pool to subsidize premium rates and can make arrangements for reinsurance of the pool in case of excessive loss. 42 U.S.C. § 4055.

520 F.2d at 17. This description indicates the extensive administrative role the federal government plays in the provision of flood insurance as well as its financial role.

In addition to § 4053 which confers federal court jurisdiction without regard to diversity or amount, 42 U.S.C.A. § 4019 has an important bearing on the issue under consideration in this case. That section, dealing with payment of claims, provides:

The Secretary is authorized to prescribe regulations establishing the general method or methods by which proved and approved claims for losses may be adjusted and paid for any damage to or loss of property which is cover-

ed by flood insurance made available under the provisions of this chapter.

Congress has undertaken to regulate the claims adjustment process and judicial review thereof, and nowhere in these statutory sections or in the regulations implementing them, 24 C.F.R. §§ 1912.21, 1912.22 (1977), is there any mention of use of the statutory law of the forum state on any issue.

[5] In discussing the law to be applied by a federal court, the Supreme Court stated in *Erie*: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." 304 U.S. at 78, 58 S.Ct. at 822. *Erie's* state law proviso does not apply when a federal statute dominates the subject matter in issue, see *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 63 S.Ct. 172, 87 L.Ed.165 (1942), or when a uniform national rule is necessary to further the interests of the federal government. *First National Bank, Henrietta v. Small Business Administration*, 429 F.2d 280 (5th Cir. 1970), quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943). Since the flood insurance program is a child of Congress, conceived to achieve policies which are national in scope, and since the federal government participates extensively in the program both in a supervisory capacity and financially, it is clear that the interest in uniformity of decision present in this case mandates the application of federal law. Cf. *First National Bank, Henrietta v. Small Business Administration*, 429 F.2d 280 (5th Cir. 1970). Thus, a prevailing plaintiff in a suit on a flood insurance policy issued pursuant to the National Flood Insurance Act is not entitled to recover the statutory penalty and attorney's fees allowed by state insurance law for arbitrary denial of coverage. *Bains v. Hartford Fire Insurance*

Co., 440 F.Supp. 15 (N.D.Ga.1977); *Drewett v. Aetna Casualty & Surety Co.*, 405 F.Supp. 877 (W.D.La. 1975), *aff'd on other grounds*, 539 F.2d 496 (5th Cir. 1976); *cf. Charleston & Western Carolina Railway Co. v. Varnville Furniture Co.*, 237 U.S. 597, 35 S.Ct. 715, 59 L.Ed. 1137 (1914) (South Carolina penalty statute for failure of an interstate carrier timely to pay a claim is invalid due to Congressional regulation of the liability of an interstate carrier). *Contra, Davis v. Aetna Casualty & Surety Co.*, 329 So.2d 868 (La. App.1976) (on rehearing).

Nothing we say here is inconsistent with *Drewett v. Aetna Casualty & Surety Co.*, 539 F.2d 496 (5th Cir. 1976). In that case, the plaintiff argued that the "loss-in-progress" principle should not be applied to a policy issued under the national flood insurance program since the National Flood Insurance Association is not an ordinary profit-seeking insurance company. In rejecting that argument the court stated:

Because the Program's exposure to claims and its premiums are required to be estimated in accordance with standard insurance practices, and because private insurers carry part of the risk, it is clear that Congress did not intend to abrogate standard insurance law principles which affect such estimates and risks.

539 F.2d at 498. The court did not hold the statutory or decisional law of any particular state to be applicable. Rather, it applied the "traditional common-law technique of decision" by drawing upon standard insurance law principles. *Cf. D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 471-72, 62 S.Ct. 676, 686, 86 L.Ed. 956 (1942) (concurring opinion of Mr. Justice Jackson).

Nor does the insurance policy itself, which was drafted under the supervision of the Secretary of HUD, indicate that state statutes allowing penalties and attorney's fees should be applied in suits over coverage. The policy states:

Any terms of this policy which are in conflict with the statutes of the State wherein the property is located are hereby amended to conform to such statutes, except that in cases of conflict with applicable Federal law or regulation, such Federal law or regulation shall control the terms of this policy.

This provision is not applicable to this case, for no "[term] of this policy" is asserted to be in conflict with any Louisiana statute. The policy does not conflict with Louisiana law. The federal scheme, which this policy provision recognizes to be controlling, simply differs from the Louisiana scheme with respect to available remedies against an insurer who disallows claims.

In sum, federal law controls disputes over the coverage of insurance policies issued pursuant to the National Flood Insurance Act of 1968 regardless of whether the district court exercises jurisdiction under 42 U.S.C.A. § 4053 or under 28 U.S.C.A. § 1332. Congress has undertaken to establish a comprehensive flood insurance program under the control of the Department of HUD to achieve policies national in scope, and the interest in uniformity of decisions compels the application of federal law. As a result, a prevailing plaintiff is not entitled to recover the penalty and attorney's fees provided by Louisiana. Nothing in the decisional law of this circuit or in the provisions of the insurance policy points to a contrary conclusion.

[6] It is clear from the foregoing discussion that the plaintiff is not entitled to an award of prejudgment interest from date of judicial demand based on La.Civ.Code Ann. art. 2924. Nevertheless, there remains an issue whether an award of prejudgment interest is required as a matter of federal law. We conclude that it is.

[7] We reject the National Flood Insurers Association's contention that prejudgment interest is not allowable since the United States government subsidizes the flood insurance program. As a general rule, the United States is not liable for interest except where the liability is imposed by statute or assumed by contract. See *United States v. Worley*, 281 U.S. 339, 50 S.Ct. 291, 74 L.Ed. 887 (1930); *Gray v. Dukedom Bank*, 217 F.2d 108 (6th Cir. 1954). The National Flood Insurers Association is not an arm of the sovereign, but an association of private insurers. That the government has a financial stake in this program is not sufficient to cloak the defendant with the robe of sovereign immunity from awards of any interest. Cf. *White v. Bloomberg*, 360 F.Supp. 58 (D.Md. 1973) (the postal service is an entity sufficiently independent of the government that a judgment against it is not one against the sovereign), *aff'd* 501 F.2d 1379 (4th Cir. 1974).²

The National Flood Insurers Association's principal argument against an award of prejudgment interest focuses on 28 U.S.C.A. §1961, which provides interest on a money judgment in a civil case from the date of the entry of judgment. The Association asserts that in the absence of a positive congressional allowance of prejudgment interest, 28 U.S.C.A. §1961 prohibits such an award. The decisions in this area,

2. The Department of HUD's assumption of the National Flood Insurers Association's liabilities does not change the extent of those liabilities.

however, indicate that the Association's reading of the statute is mistaken and that prejudgment interest is an appropriate element of compensation for a plaintiff who is successful in recovering under a flood insurance policy.

28 U.S.C.A. § 1961 does not speak to the issue whether the judgment itself will include prejudgment interest as part of the plaintiff's compensation. *Illinois Central Railroad Co. v. Texas Eastern Transmission Corp.*, 551 F.2d 943 (5th Cir. 1977). This court held in that case that 28 U.S.C.A. §1961 does not preclude a carrier from an award of prejudgment interest in its action to recover demurrage charges from a shipper, explaining:

The statute [28 U.S.C.A. § 1961] does not limit successful plaintiffs to interest from the date of their judgments. Rather it indicates that the judgment itself will bear interest, as a matter of law, from the date it is entered, and leaves to other principles of law the issue of whether the judgment itself will include prejudgment interest as part of the plaintiff's compensation. As stated in *Louisiana & Ark. Ry. Co. v. Export Drum Co.*, 359 F.2d 311, 317 (5th Cir. 1966), "§1961 . . . has nothing to do with the question of whether prejudgment interest shall be allowed as part of the compensation awarded to make the injured party whole."

551 F.2d at 944 (emphasis in original). In *Louisiana & Arkansas Railway Co. v. Export Drum Co.*, 359 F.2d 311 (5th Cir. 1966), the court concluded that prejudgment interest should be allowed in a suit under the Interstate Commerce Act by a carrier to recover freight charges that the shipper refused to pay. The rationale used by the court is equally applicable to a suit seeking recovery on an insurance policy:

As the common law recognizes in analogous situations, the only way the wronged party can be made whole is to award him interest from the time he should have received the money. At the conclusion of the dispute, the parties should be in the same position regardless of whether the shipper does not pay the disputed amount, as here, and the carrier is forced to sue, or whether the shipper pays and then sues for an overcharge.

359 F.2d at 317. See also *Rodgers v. United States*, 332 U.S. 371, 373-74, 68 S.Ct. 5, 6-7, 92 L.Ed. 3 (1947).

The court in *Export Drum* relied in part on the fact that a sum certain was in controversy; however, prejudgment interest is also available on an unliquidated claim when necessary to arrive at fair compensation. *Miller v. Robertson*, 266 U.S. 243, 257-58, 45 S.Ct. 73, 78-79, 69 L.Ed. 265 (1924). In this case, although the amount of liability was not liquidated, it was based upon the readily ascertainable value of damages to property rather than personal injury. Under such circumstances it has been held that the better practice is to allow prejudgment interest as an element of compensation in the absence of strong equities to the contrary. See *Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951, 973 (3d Cir. 1975) (action by an employer against a union under the Labor Management Relations Act); *Aetna Casualty & Surety Co. v. United States*, 365 F.2d 997, 1006-07 (8th Cir. 1966) (action by a subcontractor against a surety under the Miller Act).

[8] The major factor permeating these cases allowing prejudgment interest is that such an award is necessary to compensate an injured plaintiff. As a corollary, prejudgment interest is not allowed when it is not a necessary element

of compensation. Thus this circuit in *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972), denied prejudgment interest on a Jones Act claim for personal injuries tried on the law side, explaining:

Unlike collision cases and wrongful death cases where the loss, although unliquidated, occurs at one time and is measurable as of that time, this is a case in which the damages awarded by the jury included substantial compensation for future pain and suffering and future loss of earnings.

465 F.2d at 1168. The examples of collision cases and wrongful death cases cited by the *Barrios* court were *O'Donnell Transportation Co. v. City of New York*, 215 F.2d 92 (2d Cir. 1954) (prejudgment interest in order to make the injured party whole is the general rule in admiralty cases), and *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959) (interest from the date of death is necessary to provide "fair and just compensation" in an action under the Death on the High Seas Act). Since *Berry v. Sladco, Inc.*, 495 F.2d 523 (5th Cir. 1974), the case chiefly relied upon by the defendant, was a personal injury action under the Outer Continental Shelf Lands Act, the rationale of the *Barrios* court explains the result reached there. See also *National Airlines, Inc. v. Stiles*, 268 F.2d 400, 406 (5th Cir. 1959) (prejudgment interest is not necessary in a personal injury action where a plaintiff has the right "to recover for pain and suffering and injuries up to the date of trial and as to the future"). Although some courts have relied on 28 U.S.C.A. §1961 to deny prejudgment interest in personal injury claims based upon federal law, as did the *Berry* court, these holdings are not to be read as relating to prejudgment interest awarded as part of the compensation to make the injured party whole.

See *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958, 972-73, & n.12 (5th Cir. 1969).

[9] The National Flood Insurance Act was intended in part to make insurance with adequate limits of coverage available to persons for flood losses. 42 U.S.C.A. § 4002(a) (5), (6). The damages recoverable are pecuniary in nature, not personal, and the amount is based upon the readily ascertainable value of services and property. Fair compensation to the plaintiff for his loss covered by the insurance policy issued by the defendant can only be achieved by including the award of prejudgment interest as a mandatory element of damages. See *Louisiana & Arkansas Railway Co. v. Export Drum Co.*, 359 F.2d 311, 317 (5th Cir. 1966). On remand the district court should award Mr. West interest from the date payment was due under the policy provisions. As a matter of convenience and practicality, the amount of interest should be determined at the rate allowed by the law of the forum state. See *Louisiana & Arkansas Railway Co. v. Export Drum Co.*, 359 F.2d at 317.

REVERSED AND RENDERED, IN PART, AND REMANDED, IN PART.

APPENDIX B

42 U.S.C.A. Sections 4001, 4012 and 4012a

§ 4001. Congressional findings and declaration of purpose

Necessity and reasons for flood insurance program

(a) The Congress finds that (1) from time to time flood disasters have created personal hardships and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources; (2) despite the installation of preventive and protective works and the adoption of other public programs designed to reduce losses caused by flood damage, these methods have not been sufficient to protect adequately against growing exposure to future flood losses; (3) as a matter of national policy, a reasonable method of sharing the risk of flood losses is through a program of flood insurance which can complement and encourage preventive and protective measures; and (4) if such a program is initiated and carried out gradually, it can be expanded as knowledge is gained and experience is appraised, thus eventually making flood insurance coverage available on reasonable terms and conditions to persons who have need for such protection.

Participation of Federal Government in flood insurance program carried out by private insurance industry

(b) The Congress also finds that (1) many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions; but (2) a program of flood insurance with large-scale participation of

the Federal Government and carried out to the maximum extent practicable by the private insurance industry is feasible and can be initiated.

Unified national program for flood plain management

(c) The Congress further finds that (1) a program of flood insurance can promote the public interest by providing appropriate protection against the perils of flood losses and encouraging sound land use by minimizing exposure of property to flood losses; and (2) the objectives of a flood insurance program should be integrally related to a unified national program for flood plain management and, to this end, it is the sense of Congress that within two years following the effective date of this chapter the President should transmit to the Congress for its consideration any further proposals necessary for such a unified program, including proposals for the allocation of costs among beneficiaries of flood protection.

Authorization of flood insurance program; flexibility in program

(d) It is therefore the purpose of this chapter to (1) authorize a flood insurance program by means of which flood insurance, over a period of time, can be made available on a nationwide basis through the cooperative efforts of the Federal Government and the private insurance industry, and (2) provide flexibility in the program so that such flood insurance may be based on workable methods of pooling risks, minimizing costs, and distributing burdens equitably among those who will be protected by flood insurance and the general public.

Land use adjustments by State and local governments; development of proposed future construction; assistance of lending and credit institutions; relation of Federal assistance to all flood-related programs; continuing studies

(e) It is the further purpose of this chapter to (1) encourage State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses, (2) guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards, (3) encourage lending and credit institutions, as a matter of national policy, to assist in furthering the objectives of the flood insurance program, (4) assure that any Federal assistance provided under the program will be related closely to all flood-related programs and activities of the Federal Government, and (5) authorize continuing studies of flood hazards in order to provide for a constant reappraisal of the flood insurance program and its effect on land use requirements.

Mudslides

(f) The Congress also finds that (1) the damage and loss which results from mudslides is related in cause and similar in effect to that which results directly from storms, deluges, overflowing waters, and other forms of flooding, and (2) the problems involved in providing protection against this damage and loss, and the possibilities for making such protection available through a Federal or federally sponsored program, are similar to those which exist in connection with efforts to provide protection against damage and loss caused by such other forms of flooding. It is therefore the further purpose of this chapter to make available, by means of the

methods, procedures, and instrumentalities which are otherwise established or available under this chapter for purposes of the flood insurance program, protection against damage and loss resulting from mudslides that are caused by accumulations of water on or under the ground.

Erosion and undermining of shorelines by waves or currents

(g) The Congress also finds that (1) the damage and loss which may result from the erosion and undermining of shorelines by waves or currents in lakes and other bodies of water exceeding anticipated cyclical levels is related in cause and similar in effect to that which results directly from storms, deluges, overflowing waters, and other forms of flooding, and (2) the problems involved in providing protection against this damage and loss, and the possibilities for making such protection available through a Federal or federally sponsored program, are similar to those which exist in connection with efforts to provide protection against damage and loss caused by such other forms of flooding. It is therefore the further purpose of this chapter to make available, by means of the methods, procedures, and instrumentalities which are otherwise established or available under this chapter for purposes of the flood insurance program, protection against damage and loss resulting from the erosion and undermining of shorelines by waves or currents in lakes and other bodies of water exceeding anticipated cyclical levels.

Pub.L. 90-448, Title XIII, §1302, Aug. 1, 1968, 82 Stat. 572; Pub. L. 91-152, Title IV, §409(a), Dec. 24, 1969, 83 Stat. 397; Pub.L. 93-234, Title I, §108(a), Dec. 31, 1973, 87 Stat. 979.

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§ 4012. Scope of program and priorities

Priority for insurance for certain residential and church properties and business concerns

(a) In carrying out the flood insurance program the Secretary shall afford a priority to making flood insurance available to cover residential properties which are designed for the occupancy of from one to four families, church properties, and business properties which are owned or leased and operated by small business concerns.

Availability of insurance for other properties

(b) If on the basis of --

(1) studies and investigation undertaken and carried out and information received or exchanged under section 4014 of this title, and

(2) such other information as may be necessary, the Secretary determines that it would be feasible to extend the flood insurance program to cover other properties, he may take such action under this chapter as from time to time may be necessary in order to make flood insurance available to cover, on such basis as may be feasible, any types and classes of --

(A) other residential properties,

(B) other business properties,

(C) agricultural properties,

(D) properties occupied by private nonprofit organizations, and

(E) properties owned by State and local governments and agencies thereof,

and any such extensions of the program to any types and classes of these properties shall from time to time be prescribed in regulations.

Availability of insurance in States or areas evidencing positive interest in securing insurance and assuring adoption of adequate land use and control measures

(c) The Secretary shall make flood insurance available in only those States or areas (or subdivisions thereof) which he has determined have --

(1) evidenced a positive interest in securing flood insurance coverage under the flood insurance program, and

(2) given satisfactory assurance that by December 31, 1971, adequate land use and control measures will have been adopted for the State or area (or subdivision) which are consistent with the comprehensive criteria for land management and use developed under section 4102 of this title, and that the application and enforcement of such measures will commence as soon as technical information on floodways and on controlling flood elevations is available.

Pub.L. 90-448, Title XIII, §1305, Aug. 1, 1968, 82 Stat 574
 Pub.L. 91-152, Title IV, § 410(a), Dec. 24, 1969, 83 Stat. 397; Pub.L. 92-213, §2(c)(1), Dec. 22, 1971, 85 Stat. 775.

4012a. Requirement of flood insurance for Federal approval of financial assistance

Amount and term of coverage

(a) After the expiration of sixty days following December 31, 1973, no Federal officer or agency shall approve any financial assistance for acquisition or construction purposes for use in any area that has been identified by the Secretary as an area having special flood hazards and in which the sale of flood insurance has been made available under this chapter, unless the building or mobile home and any personal property to which such financial assistance relates is, during the anticipated economic or useful life of the project, covered by flood insurance in an amount at least equal to its development or project cost (less estimated land cost) or to the maximum limit of coverage made available with respect to the particular type of property under this chapter, whichever is less: *Provided*, That if the financial assistance provided is in the form of a loan or an insurance or guaranty of a loan, the amount of flood insurance required need not exceed the outstanding principal balance of the loan and need not be required beyond the term of the loan.

Federal regulations for flood insurance requirement: amount of coverage

(b) Each Federal instrumentality responsible for the supervision, approval, regulation, or insuring of banks, savings and loan associations, or similar institutions shall by regulation direct such institutions not to make, increase, extend, or renew after the expiration of sixty days following December 31, 1973, any loan secured by improved real estate or a

mobile home located or to be located in an area that has been identified by the Secretary as an area having special flood hazards and in which flood insurance has been made available under this chapter, unless the building or mobile home and any personal property securing such loan is covered for the term of the loan by flood insurance in an amount at least equal to the outstanding principal balance of the loan or to the maximum limit of coverage made available with respect to the particular type of property under the chapter, whichever is less.

State-owned property; exemption; list of States

(c) Notwithstanding the other provisions of this section, flood insurance shall not be required on any State-owned property that is covered under an adequate State policy of self-insurance satisfactory to the Secretary. The Secretary shall publish and periodically revise the list of States to which this subsection applies.

Pub.L. 93-234, Title I, § 102, Dec. 31, 1973, 87 Stat. 978

APPENDIX "C"

24 C.F.R. Sections 1909.1 and 1911.4

24 C.F.R. § 1909.1

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 "Flood" or "Flooding" means:

(a) A general and temporary condition of partial or complete inundation of normally dry land areas from:

- (1) The overflow of inland or tidal waters.
- (2) The unusual and rapid accumulation or runoff of surface waters from any source.

(3) Mudslides (i.e., mudflows) which are proximately caused or precipitated by accumulations of water on or under the ground.

(b) The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels for suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding as defined in (a)(1) of this section.

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24 C.F.R. § 1911.4

"Mudslide" (i.e. mudflow) describes a condition where there is a river, flow or inundation of liquid mud down a hillside usually as a result of a dual condition of loss of brush cover, and the subsequent accumulation of water on or under the ground preceded by a period of unusually heavy or sustained rain. A mudslide (i.e., mudflow) may occur as a distinct phenomenon while a landslide is in progress, and will be recognized as such by the Administrator only if the mudflow, and not the landslide, is the proximate cause of damage that occurs.

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§ 1911.4 Limitations on coverage.

(a) All flood insurance made available under the Program is subject

(1) To the Act, the Amendments thereto, and the Regulations issued under the Act;

(2) To the terms and conditions of the Standard Flood Insurance Policy, which shall be approved by the Administrator for substance and form, and is subject to interpretation by the Administrator as to scope of coverage pursuant to the applicable statutes and regulations;

(3) To the specified limits of coverage set forth in the Application and Declarations page of the policy; and

(4) To the maximum limits of coverage set forth in § 1911.6.

(b) Insurance under the Program is available only for loss due to flood, as defined in §1909.1 of this subchapter. The policy covers damage from a general condition of flooding in the area which results from other than natural causes, such as the breaking of a dam, but does not cover damage which results from causes on the insured's own property or within his control or from any condition which causes damage, which condition is substantially confined to the insured's premises or properties immediately adjacent thereto.

(c) The policy does not cover losses from rain, snow, sleet, hail, or water spray that do not result in a general condition of flooding. It covers losses from freezing or thawing, or from the pressure of weight of ice and water, only where they occur simultaneously with and as a part of flood damage. It covers losses from mudslide (i.e., mudflow) but does not cover damage from landslides or from earthquakes or similar earth movements which are volcanic or tectonic in

origin. The policy does not cover erosion which is not flood-related, claims resulting from occurrences already in progress at the time of the inception date of the term of the policy, or losses caused by land slippage rather than mudslide (see definition of mudslide/mudflow in §1909.1 of this subchapter). Damage by seepage and sewer backup may be covered only when directly resulting from a flooding situation. Abnormal erosion caused by high water levels accompanied by violent wave action along a lake or other body of water is considered a flood (see definition of flood-related erosion in §1909.1 of this subchapter). However, there is no coverage where normal, continuous wave action, accompanied by erosion or the gradual and anticipated wearing away of the land is the proximate cause of property damage.

(d) The policy protects against loss to contents only at the location described in the application, except that contents necessarily removed from the premises for preservation from a flood are protected against loss or damage from flood at the new location pro rate for a period of 30 days.

APPENDIX D

Excerpts from Transcript
(Daigle Case)
(120)

...oOo...

BY MR. BABIN:

Q At this time, Mrs. Daigle, do you own the house, do you and your husband own the house outright?

(BY MRS. DAIGLE):

A Yes, we do.

Q The Act of Sale itself says August of '66 not '64. Was the house new at the time that you purchased it?

A Yes, it was.

Q Had you ever noticed any damage to the house at the time you purchased it?

A No, sir.

Q I see. Had you noticed any damages develop with the structure of the house over the years?

A No, we had no problem.

Q I see. When was the first time you did notice some type of damage, if you did?

A Well, the only thing we noticed was right after the rain in the spring of '73.

MR. BIENVENU:

I am sorry but I cannot hear the witness, if the Court please.

THE COURT:

Ma'am, please speak a little louder.

(121)

BY THE WITNESS (MRS. DAIGLE):

A We noticed cracks in the spring of '73.

BY MR. BABIN:

Q I see. You referred to a storm. Do you know approximately when this storm occurred?

A The rain storm? April the 17th of '73.

Q I see. Could you describe the weather conditions immediately prior to that day and on the day?

A I don't remember any bad weather until the rain started about five or six o'clock.

Q Which date was that?

A April the 17th.

Q 17th?

A Yes.

Q Was there any water in the area accumulated as a result of this rain?

A Yes, there was water in the streets almost waist deep.

Q I see. You said almost waist deep?

A Yes.

Q And did you take pictures of that, subsequent to the deluge?

A Yes, sir.

...oOo...

(125)

BY MR. BABIN:

Q When did you apply for flood insurance, Mrs. Daigle?

A As soon as it was available. I don't remember the date.

Q How did you learn it was available?

A It was advertised in the newspaper and on the radio.

Q I see. And you did purchase flood insurance? Did you purchase flood insurance and pay for it?

A Yes.

Q I see.

MR. BABIN:

Your Honor, in connection with the testimony, I offer, introduce, and ask to be filed in evidence the policy of flood insurance and the check by Mr. and Mrs. Daigle in the amount of seventy-three dollars as premium payment therefor.

THE COURT:

All right, sir. The policy of insurance has a maximum limit of seventeen thousand, five hundred dollars. That is true in each case. All right. You may proceed.

MR. BABIN:

Your honor, I would like to have this introduced as P-3. I would like to note for the Court that the policy term is from March the 31st, 1973 to March the 31st of '74.

(126)

THE COURT:

This policy covers any loss up to seventeen thousand, five hundred dollars that the plaintiff sustains as a direct loss by flood. All right.

(Whereupon said documents marked P-3 for identification were received into evidence and filed with the Clerk of Court.

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...o0o...

NOTE: P-3 - Policy of flood insurance and cancelled check
for premium (sent in the original)

...o0o...

(129)

...o0o...

BY MR. BABIN:

Q Now, Mrs. Daigle, when did you first notice the damage
which you spoke of to your house?

(BY MRS. DAIGLE);

A Almost immediately after the rain. We heard a lot of
cracking throughout the day, constant cracking. And then
we started noticing small cracks that got bigger and bigger
until we realized we had a big problem.

Q Now, let's get the time sequence straight. You purchas-
ed, as the policy indicates, that is in evidence, that the ef-
fective date of the policy is March 31st of '73. This rain
occurred April the 17th?

A Yes.

...o0o...

A-41

(149)

BY MR. BABIN:

Q Now, Mrs. Daigle, again, can you describe the weather
conditions on the day of April 17th?

A I don't remember any bad weather until the rain started.
Once it started raining, it just didn't stop.

Q I see.

MR. BABIN:

Your Honor, in connection with the testimony of the wit-
ness relating to climatological conditions, I ask the Court
take judicial notice of a publication signed by and issued by
the Department of Commerce.

THE COURT:

Probably so. I will have to see it.

MR. BIENVENU:

I have no objection if that is the one you sent me.

MR. BABIN:

That's correct, Your Honor.

THE COURT:

Let it be received in evidence.

(Whereupon said document marked P-9 for identification was received into evidence and filed with the Clerk of Court.)

...oOo...

NOTE: P-9 - Report published by Department of Commerce re weather conditions (sent in the original)

...oOo...

(150)

THE COURT:

What was April the 17th?

MR. BABIN:

1973. That, Your Honor, was going to describe the evidence that I will submit.

THE COURT:

Let me see it, please, sir.

MR. BABIN:

All right.

THE COURT:

Well, I will give it back to you. What was that, some hurricanes or something?

MR. BABIN:

No, Your Honor. It indicates -- Well, I will describe it as I go through them. But, basically, it indicates that approximately fourteen inches of rain fell in the area, the Morgan City area, on a twenty-four period of April the 17th to the 18th, that flooding conditions occurred in the Morgan City area.

MR. BIENVENU:

Well, we are not interested in the Morgan City area. There is no doubt about the fact that the records show that kind of rain fell, but we are interested in what happened at this lady's house.

THE COURT:

Well, the Court will receive those in evidence.

MR. BABIN:

All right, Your Honor. In connection with this, I do want to point out a special weather summary which is signed by George W. Cry, who is a climatologist for the National Weather Service. In the special weather summary and this is for March, '73, which is prior to the April month. And it said that precipitation was

(151)

heavy with measurable amounts on twelve to sixteen days in most areas. Excessive general rains fell in various sections on

the 4th, 5th, 15th and 16th and 23rd and 24th of March. Monthly totals were in excess of ten inches throughout most of the state except in the northwest and along the west Louisiana coast. Totals were more than double March normals at most places in Central, East Central, Southwest, South Central. And a map is provided which indicates Morgan City falling within the South Central area. And from one hundred to a hundred and fifty to nearly two hundred per cent in the Northern Divisions. So, there was quite a bit of rain in the north part of the state, also. Normals, when they say --

THE COURT:

Are we interested in March or April?

MR. BABIN:

Well, March and April, Your Honor. The whole thrust of the thing is, Your Honor, that flooding conditions occurred along the Mississippi and Atchafalaya River areas, that as a result of this flooding condition, the soil became saturated and then the final deluge in April --

THE COURT:

Well, good. Proceed with the evidence.

MR. BABIN:

Okay. Normals, as indicated, are over a thirty year period from 1931 to 1960. So, this deviation from the normal is compared over a thirty year

(152)

period. Another part of the data is for April, 1973. It indicated on the face that the greatest one day of precipitation was in the Morgan City area on April the 17th, of 7.81 inches. And, also, indicated in the daily precipitation schedule that 5.03 inches fell on the 17th, and 7.81 fell on the 18th of that month. Again, in the annual summary for 1973, they indicate that April was a very wet month, departing from the normal, which was established over a thirty year period, of 10.76 inches. Also, indicating in the subsequent months that the weather was extremely dry and below normal rainfall occurred. As will later be pointed out, in evidence, this will become significant. That's all that I have on that evidence, Your Honor.

MR. BIENVENU:

Did you mark it?

MR. BABIN:

I offer and ask that it be introduced in evidence as Plaintiff's exhibit P-9, 10 and 11 for identification were received into evidence and filed with the Clerk of Court.)

...o0o...

NOTE: P-9, 10 and 11 - Special Weather Summary signed by George W. Cry of the National Weather Service (sent in the original).

...o0o...

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(153)

...oOo...

CROSS EXAMINATION

BY MR. BIENVENU:

Q Mrs. Daigle, your house is higher than the road in front of it, is it not?

(BY MRS. DAIGLE):

A Yes.

Q And your yard in the front sloped down to the roadway, is that not true?

A Yes, sir.

Q And do you know the size of your lot, approximately?

A Sixty by approximately one hundred and twenty.

Q Can you tell me approximately how far from the road your house is located?

A About thirty feet.

...oOo...

(157)

(BY MR. BIENVENU):

A-47

Q Now, you spoke about the rain on April the 17th, and I believe you gave us some period of time but I am not sure that I understood you. When did the rain start in April?

(BY MRS. DAIGLE):

A Late afternoon, five o'clock in the afternoon.

Q And when did it stop?

A Well, it went on into the night. I don't know exactly when it stopped but it went into the night.

Q April 17th, into the night?

A Yes.

Q Did it rain on the 18th all day?

A No, I am sure it stopped early on the 18th because I took the pictures and it wasn't raining.

...oOo...

(166)

(BY MR. BIENVENU):

Q Okay. Is the canal in the back of your house a drainage canal?

(BY MRS. DAIGLE):

A Yes.

A-48

Q Are there pumps to pull it out, or do you know?

A There are pumps.

Q And when it has been filled before, as you have said, how long has it taken for water to be pumped out after the rain has stopped?

A Well, it's been several hours before it was down.

Q I see. And how long did it take for water to be pumped out after that heavy rain of the 17th and 18th, if you recall?

A Not until late that afternoon.

Q Afternoon of what? The 18th?

A The 18th.

Q So, it was then again several hours, as it had been in the past?

A Oh, yes, sir.

...o0o...

(169)

...o0o...

BY MR. BIENVENU:

Q Mrs. Daigle, referring again to your two pictures that you identified earlier, which were taken by you, and the first

A-49

one is P-2-B, and I believe you said that you took that with your back to the house and looking to your left, is that right?

(BY MRS. DAIGLE):

A That's right. Yes.

Q And then P-2-A was taken looking in the same direction, isn't that right?

A Yes, sir.

Q And on the left-hand bottom of the picture, there is a post, fence post, is that fence post to your --

A Yes, sir.

Q Now, do you know what the mud in the street is?

A It looks like two piles of dirt from the neighbor.

(170)

Q The neighbor? They were in his front yard, weren't they and they washed down into the street?

A No. It was on the neutral ground.

Q On the neutral ground?

A On the other side of the sidewalk.

Q By neutral ground, you mean the ground immediately adjacent to the sidewalk, but you have no middle median?

A-50

A No. Between the sidewalk and the street.

Q How long had that been there? Do you know?

A No, I sure don't.

Q Now, you took these pictures, both, on August (sic) the 18th, 1973? That was after the rain stopped, obviously?

A That's right.

Q Did you take any pictures from your house looking directly out into the street?

A No, I sure didn't.

Q You didn't, huh?

A That's the only ones I took.

Q I see. Let me ask you this. Looking at the one, P-2-B, the greenery, is there not a line showing how high the water actually came?

A Yes, there would be something right here.

Q Brown, a little brown debris, isn't that right, and some on the sidewalk as well?

A Yes, sir.

...o0o...

(232)

...o0o...

A-51

(BY MR. SHUMAKER):

A The damages on his house there did not indicate that they were prior to a month or few months before. You can take a brick there where it's cracked and you can tell if it's a recent break or an old break. And everything was there to indicate that the damages that I saw were very recent.

(BY MR. BIENVENU):

Q And I guess you saw that when you made up this report in September, 1973, sir, is that right?

A I saw then and I saw back in July.

(233)

Q Oh, you examined the house yourself in July?

A Yes, sir. As I explained awhile ago, sir.

...o0o...

(252)

...o0o...

(BY MR. BIENVENU):

Q I see. All right, sir.

(BY MR. GUILLORY):

A In case of the type of rain we had on April the 17th,

when the streets were flooded, and as I recall, most of the lot was flooded. I am sure that the clays get supersaturated and we have evidence that buildings in that part of the country not only settle but they also heave. Mr. Shumaker just testified, if I may refer to that, Your Honor.

...oOo...

(264)

...oOo...

(BY MR. BIENVENU):

Q But it is common knowledge, is it not, in the Morgan City area that the place where these houses were built, were built over swamp and there was no soil sustain to the weight of those houses, isn't that right?

(BY MR. GUILLORY):

A That there was no soil to sustain their weight, no, sir, I can't agree with that. Obviously, there was because for seven years it sustained it.

Q How do you know?

A Because there was no cracking.

Q How do you know?

A I would think a housewife would have a crack in a house after seven years and didn't find it --

Q Yeah, but how do you know?

(265)

THE COURT:

Well, of course, this is based on the presumption and his opinion is based on the presumption that the lady had lived in the house since April of 1966 and that she hadn't noticed any of these before April of '73. You are basing your whole opinion on the presumption?

THE WITNESS:

Yes, sir. The fact that I see her for about seven hours a day and five days a week. I am sure she would have discussed it with me, as she did when it finally did occur.

...oOo...

(268)

(BY MR. BIENVENU):

Q And your thought is that there was no appreciable sinking of that house before?

A The evidence indicates that.

Q Sir?

A The lack of cracking indicates there was no appreciable sinking.

...oOo...

BY MR. BABIN:

Q Mr. Guillory, have you read Dr. Capozzoli's report?

(BY MR. GUILLORY):

A I see here in my letter, I state that I did. Of course, this was quite some time ago and I don't remember any details of it.

Q At that time, in your report, in referring to the type of houses, like brick veneer homes, that occur in this area that are built in the area where Mrs. Daigle lived, didn't you state that it was your experience that there was slight settlement or heaving during wet and dry periods?

A Yes, sir.

Q Now, this would be during normal wet and dry periods, either before or after the big rain?

A Right.

Q Okay. And that there would be slight movement of the foundation during these times, before and after?

A Yes, sir.

Q But that the big rain would have changed those conditions, would it not?

A Well, it was a more extreme condition. I think the prin-

ciples involved are the same, sir, it's just more of it.

Q I see. It would cause a greater heaving?

A Yes, sir, and consequently a quicker lowering.

Q I see.

A Because of the speed with which the canals were drained.

Q Now these are monolithic slabs, are they not, much like a brick, say, on a smaller scale?

A Well, a monolithic means that you are pouring the slab and the foundation simultaneously.

Q I see. When I use the analogy like a brick, for instance, this aggravated heaving, going up and down, if you dropped a brick, would it be like dropping these monolithic slabs, would it break because of the great heaving?

A That's the principal involved, yes.

...oOo...

...oOo...

PROCEEDINGS OUT OF THE PRESENCE OF THE JURY:

THE COURT:

The Court, of course, is required to excuse the jury at

A-56

the completion of the plaintiff's evidence in order to afford counsel an opportunity to make any motions they might wish to make, and that was the purpose of my excusing the jury. Mr. Bienvenu.

MR. BIENVENU:

Yes, sir. As I understand it, the plaintiff Daigle rests.

THE COURT:

That is correct.

MR. BIENVENU:

At this time, if the Court please, we move the Court to direct a verdict in favor of the defendant because the evidence does not establish that there was a direct loss by flood to the property of the insured. And, further, that the evidence also establishes that the loss, as attempted to be established by plaintiff, falls within the perils excluded by the company.

THE COURT:

Have you completed your dissertation?

MR. BIENVENU:

I have, sir, unless you want to hear some argument from me.

...oOo...

A-57

(276)

...oOo...

(THE COURT):

Of course, depending upon what the jury does one way or the other, I don't know that this isn't a case regardless of who wins it before the jury, I am not going to have -- I mean, generally, if the defendant wins before a jury they go home elated and happy and think the battle is over but I don't know in this case whether that's true or not. Of course, I have only heard the evidence from your expert. I don't know what Mr. Bienvenu's experts are going to say. What are you going to say, Doctor, caused that damage?

DR. CAPOZZOLI:

Just the long-term draw down of the water in the canal of which this flood was a very

(277)

small portion of it.

THE COURT:

The flood was a portion of it?

DR. CAPOZZOLI:

Very small portion. According to the numbers here, the canal was generally eight feet below the house and they

rapidly pumped out the canal after the flood down to ten feet for a period of a few days, maybe.

THE COURT:

That's something the lawyers are going to have to argue about before the jury. My own impression would be a great deal of that would depend upon the supposition that these people had been in this house for a long time and never noticed this before. And, as Mr. Guillory says, he knows that his secretary would have told him about it had it happened before.

I don't know, but my personal viewpoint, unless there is some evidence to the contrary, I would certainly have to assume that it hadn't happened before, when they hadn't seen it before.

MR. BIENVENU:

Hadn't seen it.

THE COURT:

I understand the problem and I am faced with a legal proposition. First, I am going to let the jury decide. I am going to read them flood. I am going to read them the perils and I am going to read them direct loss by flood. Maybe resort to a dictionary will help. I don't know. Thank you very kindly.

...oOo...

(294)

...oOo...

(BY MR. BIENVENU):

Q All right. As a result of that information and your study, did you reach any conclusion as to whether or not the rain of April 17th and 18th, 1973, caused the damage complained of by the Daigles?

(BY DR. CAPOZZOLI):

A Yes, I reached a conclusion. My conclusion was that the rain had practically no effect on the action of the soil or houses.

Q Why is that, sir?

A My analyses and the reasoning brought out this mechanism or movement of the soil under the houses. The area was swamp. Water was standing in it, which I saw by aerial photos taken by the Government and had trees growing in it. The area was re-claimed. The levee was put around this portion. Canals were dug, drainage was put in, water was

(295)

pumped out, and successive rain waters that fell at the house were also pumped out. The net effect of this reclamation process was to dry the soil. In other words, the water that fell down there and stayed there before was not being taken away. The drying could be more pronounced on the north

side of the Bellow residence and the Daigle residence, and all the residences on that street. Of course, they were closest to the canal. The fact that the canal had been for seven or more years prior to the April, '72 (sic) floods gave the soil at least that seven years to dry. Now, the drying of this soil would cause it to settle, cause it to sink, cause it to move downward for two reasons. Number one; when you dry something you take the water away or lower the water level. You make it heavier. An analogy, a person sitting in a bath tub. When the tub is empty he feels fairly heavy, when the tub is full of water, he is quite light. The same thing with soil. The water you have supporting it up, the less it weighs. So, by putting this drainage in and re-claiming this land and taking water away, you are drawing the soil, making it heavier and causing this soft humus, very soft clay, to compact under its own weight. The second action that would occur as a result of this organic matter which is not exposed to air instead of being under water, as it was before, this organic matter is not exposed to air. It will tend to decay whereas under water it would not decay.

(296)

Q Even though some of it is under ground?

A Yes. Of course, organic matter is spongy and you would get air into it. Now, these two actions would occur without any weight on the soil whatsoever. I think the justification for that analogy, the purpose of that analogy, is borne out by pot holes that were seen in the yard, front and rear yard of the Daigle residence. In other words, there was no weight there but I could see it had been there, yet, you still have little sinking of the ground causing the pot holes to develop.

So it's my opinion that type of shrinkage of the soil occurred as a result of the land development rather than the building being on it or any building that may have occurred before that.

Q What happened after that building was put on there?

A The weight of the building just added a third item to the weight of the soil which was increased because of the lowering of the water table. They had the decay of the humus and now you have the weight of the building, so that's going to tend to make the building go down more than the normal soil.

Q I think I asked this, but in your opinion, would the building go down, the slab go down evenly or unevenly?

A Most likely unevenly because the soil was not uniform.

(297)

Q Now, you heard the testimony about the rain water on the 17th and 18th of April, 1973. And about flooding in the streets and water in the canal in the rear and then the subsequent draining of the water, some say hurriedly, two days, I think, or forty-eight hours. In your opinion, would that flooding and subsequent draining have anything to do with the soil immediately under the house, remembering that water did not reach the house but only to some point in front of the house, half-way up from the street out there?

A The total effect of the flooding, in my opinion, would be negligible. There would be some occurrences as a result of the flooding. For instance, the soil that had been dry, as a result

A-62

of the canal the water went down five or six feet, that soil would get saturated. Of course, it would get saturated by heavy rain, too. So, that soil was thoroughly saturated but not much more so likely than in a heavy rain. Now, it was brought out by Mr. Guillory that when you saturate the soil, rather than dry it, you cause it to swell when you wet it and it will shrink when it dries. Of course, fortunately for engineering, when the soil swells after it has been dried, it only swells out ten per cent. So, the net effect is a constant sinking. So, if you take, you say this building went down an inch as a result of the drying action in the previous years, it would come up, in my opinion, no more than a tenth of an inch. If it went down two inches,

(298)

then it would be two tenths of an inch. So, of course, it would go down -- this would happen after two inches or three inches or four inches of rain, maybe not quite as much as it would if it backed up to the house. As far as the canal being drawn down rapidly versus a slow draw down affecting the house, in my opinion, that had no effect. The flow of water through the soil would be relatively slow whether the canal was down within one day or one week, will not affect your house. In my opinion, two months after the flood, one month after the flood, it made no difference in the condition of the house whether the flood occurred or not.

Q How about six months after, seven months after, eight months?

A The longer you go, the less effect it has.

...oOo...

A-63

(308)

...oOo...

THE COURT:

Well, the question is, Doctor, of course, I think we have brought it to a good head before but if there had been no cracking for the previous seven years and no settlement for the previous seven years, would then, under those circumstances, you agree with Mr.

(309)

Guillory?

THE WITNESS (DR. CAPOZZOLI):

If someone told me, that I know personally, by looking and inspecting it, a professional, that there were no cracks in the house on April the 10th or 12th, and there were cracks on April the 18th and 19th, then I would agree with him, that that was the cause.

MR. BABIN:

No further questions.

...oOo...

(313)

MR. BIENVENU:

One minute, please. The defendant rests, if the Court please, in the Daigle case.

THE COURT:

Both sides may file any motions they wish at this time.

MR. BIENVENU:

We desire to file a motion for a directed verdict on all the evidence because, as we pointed out, we are of the opinion that the evidence overwhelmingly does not establish, I mean overwhelmingly establishes this was not a direct loss by flood. Plaintiff has not established that this was a direct loss by flood, and the exclusions of the policy in addition, which are made applicable by the testimony rendered here today certainly would defeat any attempt to bring in this claim under the policy provisions which are rather plain. And if you would like me to refer particularly to the exclusions in the policy --

THE COURT:

I think what you are referring to, I presume, is rain, sleet, snow, hail, and so forth?

MR. BIENVENU:

That's one part, and then you go to two and three, numbers two and three in "A", two and three in "A", Judge.

THE COURT:

I have them. Yes, sir, I am familiar with them.

MR. BIENVENU:

All right, and then "D" and "F" would equally apply.

THE COURT:

I see. I have them. All right,

(314)

sir.

MR. BABIN:

Your Honor, in connection, I would like to make my own motion.

THE COURT:

Well, surely. You can make one but let me rule on his first.

MR. BABIN:

Okay.

THE COURT:

Well, Mr. Bienvenu's two-pronged attack, of course, is really but one assertion, and that is that there is just no evidence here that this damage was directly the result of a flood.

A-66

If he wins on that facet of the case, he automatically wins on the perils excluded facet of the case.

I think it's one and the same. I think it is going to be a jury issue but, anyway, I am going to deny the motion.

(315)

...oOo...

THE COURT:

I know, but the big problem here is what caused the homes to sink and was it a direct result of this heavy rain. I think that's what the jury is going to have to decide. The motion for a directed verdict is denied. There is no use to argue the same matter twice.

I have given you a suggested form verdict, and in each one I just say: did the Daigles sustain a direct loss to their property because of flood? If they answer that yes, then in dollars and cents how much damage was sustained as a proximate result of the flood.

And, of course, I will tell them the same thing about the next case, the West case. And I am telling them, of course, about property, we are talking about the home, and that it must have happened during the terms of the policy.

Now, on the question of what is direct loss, I have got to tell the jury something. I will read them the policy but I will charge them, unless someone can show me why I should not from 249 Federal Reporter at 164. I will tell them that

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it is well settled that the word direct cause as used in all insurance policies is synonymous and legal intendment with the word proximate cause.

(316)

Proximate cause has many times been defined as, et cetera. Then, of course, there is a Fifth Circuit case and a Louisiana case which is cited in that case, and that goes on a Supreme Court case. The Louisiana case is the Norwhich case, N-O-R-W-I-C-H, which you will find at 141 F 2d, 600. We can go off the record.

(Whereupon an off the record discussion was had between the Court and counsel.)

(Court Recessed.)

...oOo...

(22)

(Title Omitted)

No. 19,624

SPECIAL VERDICTS

F.R.C.P. 49(a)

We, the jury in the above-captioned case, unanimously find as follows:

INTERROGATORY NO. 1

Did the Daigles sustain a direct loss to their property because

A-68

of "flood"?

Answer "Yes" or "No"

Answer: Yes

(23)

If you answer the above "Yes", then proceed to answer number two (2).

INTERROGATORY NO. 2

In dollars and cents, how much damage was sustained as a proximate result of flood? ANSWER \$12,084.56

We, the jury, have unanimously answered the above and foregoing interrogatories as herein indicated, and herewith return the same into court as our special verdicts.

s/ Russell Courville
FOREMAN OF THE JURY

Lafayette, Louisiana

February 3rd, 1976

Filed

Feb. 3, 1976

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APPENDIX E

Excerpts from Transcript of Testimony
(West Case)
(328)

...oOo...

(BY MR. BABIN):

Q Now, Mr. West, can you describe the weather conditions on April the 17th of '73? Could you describe the conditions in the street on the day after that in front of

(329)

your home?

(BY MR. WEST):

A On the 18th?

Q Right.

A Well, when I came home on the evening of the 17th -- My wife had called me. She was driving a small car and the streets were flooded about six o'clock and they couldn't get home, and she went over to a friend's house and called me and asked me to pick her up and bring her home. And I have a larger car, you know, with higher wheels. So, it was about ten or twelve inches deep in the street on the evening of the 17th.

Q Yes, sir.

A So, I drove her home and water was, you know, in my front yard about halfway to the house. And she is a little bit afraid of things like that. So, she wasn't going to stay there. So I packed her bag and carried her back up to her friend's house to pick up her car and went to her mother's for the night. And I stayed there. I parked my car up the street and walked back into the house and I stayed there.

Q I see. Now, did it or did it not continue to rain that night?

A Most of the night. I wasn't up all night but when I got up the next morning there was water lapping in my front door.

(330)

Q Water was in your house?

A It was coming in the front door on the morning of the 18th. Yes, sir.

Q I see. Now, in your area are you on the down side of a hill or up side of a hill, or can you describe the location of your property in reference to the Bayou Vista area?

A I am on the south side of Columbus Street and it goes down hill from north to south. And the houses in front of me, across the street, are about six or eight inches higher than mine. And also, the street rises from east to west and I am on about the highest part of the east-west route. The house next door, on both sides of me, had four or five inches of water in them. I had about an inch and a half in mine.

Q How much water would you say, standing, water, there

is with reference to the street below your house?

A There was three or four feet in the streets. The streets are lower, you know, because they was running thirty-five horsepower motors up and down the street picking up people and moving them out, the ones that didn't leave.

Q I see. Mr. West, had you --

THE COURT:

Well, did you all leave?

THE WITNESS:

That day I left, yes, sir.

(331)

THE COURT:

In other words, they picked you up with boats?

THE WITNESS:

Yes, sir. I had left my car up the hill, six blocks away.

THE COURT:

You and your family were all picked up?

THE WITNESS:

No, sir. I took my wife out the night of the 17th.

A-72

THE COURT:

In a car?

THE WITNESS:

In a car. Yes, sir. I drove her out, back up there where she had left her car.

THE COURT:

When did you all come back to the house?

...oOo...

(332)

...oOo...

BY MR. BABIN:

A Mr. West, was there any noticeable damage to your home prior to April 17, 1973?

(BY MR. WEST):

A No.

Q Do you have a garden?

A I had. I have had in the back of the house, yes.

Q Did you used to work in that garden?

A Yes.

A-73

Q How often?

A Oh, a couple of days a week, when my wife could hem me up out there.

(333)

Q I see. And if there had been any cracks, noticeable cracks, in the brick, and so forth, do you think you would have taken note of that while you were working in the garden?

A I am sure I would.

Q What happened with reference to your house? Did it sustain any damage after the flood?

A I had damage inside my house, tiles were coming up, water stood there about eighteen or twenty hours or something in the house and I had a lot of sediment and mud and stuff, and then afterwards the tiles started peeling up. I didn't have carpet but we picked everything up that I thought would get damaged and put the TV set up on top of the bed and what-have-you.

Q I see. This was immediately after?

A This was the evening of the 17th.

Q I see. Now, subsequent to that time, did you notice any structural damage to your home?

A Yes. A couple of weeks afterwards, it got to where I

A-74

couldn't open my back door, the sliding glass door to my patio wouldn't open. And I checked to see if it was off the rollers. It wasn't. From the outside, you could see where the wall was pulling away from the door facing, had it in a bind.

(334)

Q Did you have any problem in your kitchen?

A Yeah. There was a ridge under the tiles. You could see a ridge down across the corner of the house and a subsequent one formed off that one through the living room and out to the front door.

Q I see. Did you take pictures of that structural damage?

A A little later, I did, when it broke on through. The ridges broke and the floor separated about an inch and a half and completely cracked, moved about an inch and a half.

(343)

...oOo...

(BY MR. WEST):

A Anyway, I called Mr. Boudreaux (my insurance agent). We were all out there talking and I called my agent and asked him what I should do. He said, "Well, go ahead and clean it up as best you can, do what you can, and there will be some adjusters by when they get around there. They have two or three in town now and just keep note of what all you do." I said, "Well, my air conditioner has shorted out," and he said,

A-75

"Well, just get it fixed and keep the receipt." And he said, "That will be quite all right." He said, "they have adjusters in the area when they get around, they'll get to you." That's what I did.

...oOo...

(351)

...oOo...

(BY MR. BIENVENU):

Q Had you found it necessary to put fill on your lot, or earth on your lot, at any time?

(BY MR. WEST):

A No, sir. I never had to fill that lot.

Q How about --

A Wait. One time during a hurricane a tree blew down in my front yard and I had to fill the hole up where the tree fell down. That's the only time I ever hauled any fill.

...oOo...

(364)

...oOo...

(BY MR. BABIN):

A-76

Q 3-11. And you changed about half a dozen tiles in there, is that right?

(365)

A Yes, sir.

Q And I think you said you did something to a wall board?

A I pulled the baseboards off in my hall and living room, most of everywhere it was wet so that it would dry out, put a fan on it to dry it out. That's all.

...oOo...

(BY MR. BABIN):

Q Now, when you went to bed finally that night, I believe you said you stayed up a long time. Where was the water the last time you saw it before going to sleep?

(BY MR. WEST):

A It was in my house.

Q Oh, before going to sleep?

(366)

A Yes, sir.

Q I misunderstood. I thought you said the next morning.

A-77

A It was lapping in the front door. I tried to put a bunch of towels and throw rugs, and things, and went on to bed.

Q It was lapping at the front door?

A It was coming under the front door.

Q And did you successfully keep it out?

A No, sir, I didn't. I slowed it up a little bit. It was about waist deep in the street and my car was five blocks away. It was midnight and I didn't feel like wading through that water to get out of there, or I would have.

Q I am sure. When did you elevate the contents of your house?

A While my wife was packing to leave that evening, we picked the television set up and put it on top of the bed, and we picked up, you know, other things that we thought would be damaged.

Q And what evening are we talking about?

A The 17th.

Q The evening of the 17th?

A Yes, sir.

Q Do you remember when that rain started?

(367)

A-78

A No sir, not specifically. Sometime that afternoon when I came back by the office, they said that my wife had called and left a number. She worked and she had tried to go home and she couldn't get to the house.

Q Because of the water in the street?

A Yes, sir. She drives a little, small car and she was afraid to drive in water and so she went to a friend's house and left word for me to call her.

Q Has there ever been water on the street in front of your house before?

A Yes, sir, there has been water on the street.

Q Has there ever been water in the yard when there is water in the street?

A Right on the edge, there sure has, maybe a foot on the edge of the grass.

Q Is your house elevated from the street?

A Yes.

Q Is it higher than the street?

A Yes.

Q Six inches, would you say?

A Oh, probably, I would say more than that.

A-79

Q More than that?

A All the houses are built up like that.

Q It slopes, is that right?

A Yes, sir, slopes to the street.

(368)

Q Had you ever had anybody examine your house for you before to find out if there was anything wrong with the structure?

A No, sir. When I bought the house, it was an FHA approved house and the VA inspected it. I bought it under a VA loan and they approved it, and obviously I just accepted their approval that it was all right.

Q That was in 1969?

A Yes, sir.

Q And you think the house was about three years old then?

A Yes, sir. Something like that, yes, sir.

Q Did you buy it from a former occupant, Robert Blair, the man you bought it from?

A Right.

Q Had he lived in the house before?

A Yes, he lived in the house. He lived in it and moved to Mississippi, I believe.

Q Yes. Where was the air conditioning unit that you made reference to?

A It was in the back yard on a little cement block like you normally set outside air conditioning units on.

Q Incidentally, was there water in the back yard?

A Yes, sir.

Q Was it as high as the front yard?

(369)

A Evidently, it was. The whole yard was covered.

Q The whole yard? You think water went over the incline?

A Oh, yes, sir.

Q The top of the incline?

A Yes, sir.

Q How soon did you say that these cracks that you have had reference to appeared in your house after this flood?

A Well, we started noticing the back door, the sliding glass door wouldn't open two or three weeks after, something like that. And I was checking to find out what was the matter and I noticed the bricks was pulling away from the baseboard, and then I really got to looking and discovered the little ridge on the floor and two or three other things at that

time.

Q That's the first time that you looked to see if there were any cracks in your house?

A That's the first time I had any trouble with my door opening and closing.

Q And that's what prompted you to do that?

A Yes.

Q Is it a wooden door?

(370)

A No, sir, it's a sliding glass door, patio door.

Q It wouldn't move one way or the other?

A Well, it would with quite a bit of difficulty. It would hang. You had to jiggle it around to get it to move. It got progressively worse. You can't open it now at all. The only door I can go out of is my carport door.

...oOo...

(375)

...oOo...

(BY MR. BABIN):

Q Thank you, Carl. Now, at the time you bought your home from the Blairs in 1969, did you inspect the house?

(376)

(BY MR. WEST):

A Yes.

Q Did you make a thorough inspection of the structure of the house?

A No. My wife and I went through the house about four different times before we decided to buy it, in and around, all over.

Q And the house was three years old at this time?

A I believe that's correct.

Q And did you observe any cracks in the house?

A No, I did not.

...o0o...

(385)

...o0o...

BY MR. BABIN:

Q Now, Mrs. West, had any of the damage that you have identified in these pictures, had any of that or any of the start of that type of damage occur prior to April the 17th, to your knowledge?

(BY MRS. WEST):

A Nothing that I can notice.

Q I see. Now, how often do you clean the house?

A About twice a week.

Q I see. Thank you very much.

...o0o...

(390)

(BY MR. BIENVENU):

Q Did you ever notice any pot holes in your yard? You know what I am referring to as a pot hole, a hole of some circular dimension appearance?

A No.

Q Not at all?

A Nothing.

Q In other words, in the front or back?

A Not that I can recall.

Q At any time before or after the flood?

A I don't believe. I can't remember really noticing any.

Q I see. Now, you said, I believe, that you didn't remember whether you had left the night of the flood or the

next morning?

A I believe it was that night, if I am not mistaken.

Q And when you left, did I understand you to say something about the water lapping at the front door?

A It was seeping through under the door when I left.

Q How did you get out of your house?

A Well, I couldn't get my car in. My husband had a larger car. He took me home.

Q How did you get to the car, to and from the car? Through the front door, the side door?

A Through the side door.

Q Through the side door. Was there any water there?

(391)

A Yes, sir.

Q In the yard?

A The yard was full.

Q Was the yard completely covered with water, front and back?

A Right.

Q Now, you say water was seeping through the front door. Did you do anything to try to keep the water out?

A Well, I put rags and towels down around the doors.

Q You did that?

A I did that.

Q As I understand it, it was two or three days, you're not sure of how long it was, but you came back?

A Right.

Q When you came back, say it was two or three days later, how did you get to your house?

A Well, the water was gone then.

Q All the water was gone?

A All the water was gone.

Q In the street?

A In the street was gone.

Q Okay. Now prior to this downpour of rain, had you ever had rain which brought water onto the street and onto your yard?

A Yeah, we have in the street, up about over a fourth

(392)

of the yard.

Q Up about a fourth of the yard?

A Yes.

Q Once or several times?

A Oh, I don't know. A time or two, when we have heavy, you know, rains.

Q By a time or two, you are meaning one and two, or --

A Well, I would say a couple of times anyway.

Q A couple of times?

A Yes, uh-huh.

Q Was that long prior or immediately prior to this April rainfall that we are talking about of April the 17th?

A Well, it was over a period of since we had been there. I don't remember the dates or anything.

MR. BIENVENU:

I have no further questions. I would just like to pass these four photographs on to the jury which the witness identified as being pictures of the same area.

THE COURT:

You may do so.

MR. BIENVENU:

They have seen them -- but --

THE COURT:

You may proceed, counsel.

(393)

MR. BABIN:

As soon as the jury gets through.

RE-DIRECT EXAMINATION

BY MR. BABIN:

Q Mrs. West, after these other showers or rainstorms, referred to by Mr. Bienvenu, came into your yard partially, did you have any damage after that, that you could observe?

(BY MRS. WEST):

A Nothing.

Q This is the first time, after the April 17th deluge, 1973, big rain and flood, that's the first time you noticed damage?

A Right.

...oOo...

A-88

(398)

...oOo...

(BY MR. BABIN):

Q I see. What did you find? What was the basis of your report?

(BY MR. PATTERSON):

A Well, I found his house needed repairs, and I looked at it and decided what I thought it would take to put his house in a liveable condition, and then wrote him this letter telling him how much I thought, at that time, it would take dollar-wise.

Q What did you include as stated in your report?

A Well, I concluded at that time it would take about twenty-two thousand, nine-hundred and fifty-six dollars to make the necessary repairs. I recommended that a beefing up or a -- let's see -- demolish his present structure and replace it with the same size structure but to possibly beef up the slab to withstand any positive negative pressure that may occur in any future flooding situation. And I guess that's

(399)

it.

Q Let's see, you stated, in other words, that the entire structure would have to be demolished, is that correct?

A Well, if we were going to move in and do the work,

A-89

that's the only way we do it.

Q Is there any other -- would there be any other practical way to repair this house adequately?

A As far as I am concerned, no. We attempted to do some of this underpinning one or two other times and we weren't successful in doing it.

Q I see.

A I understand that there are people that have done it and some of the work has held up and some of it hasn't.

Q I see.

A But I didn't feel like we should expend ourselves undertaking something like this, that in my own mind, as I said, wouldn't work.

Q When you refer to underpinning -- pardon me. Upon your inspection, or did you find, or did you not find the slab, in fact, cracked?

A It was cracked in several areas.

Q How severe were these cracks?

A Well, they were so severe that if it had been my house, I wouldn't have lived in it like that.

...oOo...

A-90

(402)

...o0o...

BY MR. BABIN:

Q What do you attribute the cause as to the damage that you observed in the West home?

(BY MR. PATTERSON):

A I attribute it to the flooding of the area, the general area.

Q I see. Specifically, what evidence did you observe concerning the structure?

A Well, the evidence of the failures of the foundation. We noticed a lot of this. It happened right after the flood in the whole area, not only this area, but in other areas of Morgan City. And it's just like an earthquake, as far as I

(403)

am concerned. After an earthquake you observe things that have happened and there wasn't any earthquake. It was a flood, so I don't know of anything else to attribute it to.

Q I see. The type of foundation that the West house was resting on, would you consider that type of foundation as adequate for that house?

A It's a standard type of foundation that is used throughout that area, so if it works, you know, I don't argue with it.

A-91

Q I see.

A So I would say it would be adequate.

Q Concerning this specific area?

A Yes. Oh, yeah, that's standard. It's a monolithic slab. They used to call them a floating type slab and this is the way they are building houses today.

Q If you were building a house like this, would you do it the same way?

A If I were to remove the debris of this house, I would build it the same way.

MR. BABIN:

Thank you very much.

...o0o...

(408)

...o0o...

(BY MR. BIENVENU):

Q Isn't it a common occurrence in the Morgan City

(409)

area, in these new subdivision that have been built over old

swamp land, that houses built there do sink?

(BY MR. PATTERSON):

A Sir, I think whenever you put a load on a piece of ground, it's going to sink. You can walk on it and it's going to sink, yes, sir.

Q Well, you know this Bayou Vista area, don't you?

A Yes, sir.

Q You know that was once a swamp?

A Yes, sir.

Q And you know that the land on which this house was built was once a swamp?

A Yes, sir.

Q And you say that house would sink just from the fact that it was built on that land?

A Yes, sir. It would sink to a degree.

Q I see. And it doesn't sink evenly, it depends on the formation of the soil?

A It depends upon the formation of the soil?

Q It doesn't sink evenly because it depends upon the formation of the soil in the area under the house, is that right?

A It's possible.

Q Now, when a house sinks, that's what causes damage to the structure, is that right?

A Is that right?

(410)

Q I am asking you the question.

A No.

Q The sinking does not cause damage?

A No, sir.

Q What causes damage?

A When the foundation fails.

Q Well, what do you mean by the foundation?

A By the foundation, I mean something that is built on a foundation bed that will support a structure of some sort.

Q Well, when the land below the foundation sinks, doesn't it carry the foundation with it?

A Not necessarily.

Q Doesn't the foundation rest on the land?

A In this particular case, it does.

A-94

Q Well, in all slab cases, unless you have piles?

A No, sir. That's right. You can have a structural slab foundation that does not rest on a normal ground foundation. It's a supported structure.

Q If you have piles?

A Not necessarily piling. There are other type foundations.

Q What other kinds?

A Spread footings.

Q Well, that's a type of piles?

(411)

A But it's not piling, no, sir, it's not.

Q Did this house have that?

A Did it have what?

Q Spread footings?

A No, it didn't have.

Q This house was built on a slab?

A It was a monolithic slab, typical type foundation that the Federal Housing Authority passes, the Veteran's Administration passes for that area.

A-95

Q What do you mean by monolithic, please?

A A slab that is made, concrete poured all in one form.

Q And did this concrete slab that supports this house sink?

A It obviously sunk in some areas, Yes. Sir.

Q And am I correct that you say that when a house is built on land, such as this, it does sink because of the condition of the soil and the weight of the house?

A Absolutely.

Q You didn't see this house before the time you went there in, say July?

A Yes, sir. I almost bought a lot on the corner. I think this house, it may be two or three lots on the same street.

Q Well, you saw it but did you inspect it as you say

(412)

you did in that case?

A That's what I went out there for, to inspect the lot.

Q I am not talking about the lot, I am talking about this house?

A Oh, I stopped and visited with the Wests.

A-96

Q Before you went there in July?

A Yes, sir.

Q You visited with them. Did you inspect the house?

A Yes, sir, I guess I inspect -- by the nature of my business, I inspect every building that I probably walk into, to a degree.

Q To a degree. You said you found slabs -- I mean, cracks in the slab of the house when you were there in July, am I correct?

A Yes, sir.

Q Did you see that when you went there the first time?

A No, sir.

Q Did you examine the slab?

A No, sir, I didn't make a thorough examination of it.

Q You looked at it?

A I probably looked at the house.

(413)

Q Now, you, in your letter, say that due to the changes in the water table, it's not economically feasible to repair a slab. What do you mean by the change in the water level?

A-97

A The change in what?

Q Water table.

A By the change in the water table, I mean there is a certain elevation in the ground, you know, below the surface that has a lot of water in it, has a lot of moisture in it. This table can be, in some places, as deep as one hundred feet, probably, some places it can be one or two feet.

Q In a swamp area, what would you expect it to be?

A In an undeveloped swamp area or developed swamp area?

Q Take a developed swamp area, just as Bayou Vista.

A Oh, it could probably be a foot to two feet below the surface, possibly three feet.

Q What change do you talk about in your letter when you say the change in the water table?

A That means that this water table that I have just explained to you changed, the depth of it changes.

Q What causes that? Rain?

A No, the draining out of water in an area.

Q All right. The draining out of water in an area causes the lowering of the water table, is that right?

(414)

A Yes, sir, that's right.

Q And when you lower the water table the soil shrinks, does it not?

A In most cases.

Q And when the soil shrinks the houses on top of it drop down?

A The what?

Q The house that's on top of it, on shrinking soil, drops down, does it not?

A That's right.

Q And this has happened all over Morgan City, hasn't it.

A Yes, sir.

Q It has happened in the City of New Orleans, too. You said you were a long time resident of that City.

A No sir, I didn't say that. I said I graduated from high school in New Orleans.

Q All right, sir. Excuse me. Now, you said that if you rebuilt this house you would beef up the slab. What do you mean by that?

A I mean, that I would probably make the slab a little wider. I would probably use larger, let's say, the grade

beams, I would make them a little bit bigger and I would probably put a little more reinforcing steel in it.

(415)

Q Why? I thought you said it was standard?

A Why? I'll tell you why.

THE COURT:

Let him answer the question, please sir.

MR. BIENVENU:

All right.

BY THE WITNESS:

A Because if it ever flooded in that area again, I would try to insure that the house did not fail so I would not have to come into court like this.

BY MR. BIENVENU:

Q Did you do that in other areas where you had built houses?

A No, sir.

Q Beef up the monolithic slab?

A No, sir.

...oOo...

A-100

(422)

PROCEEDINGS OUT OF THE PRESENCE OF THE JURY:

THE COURT:

The Court will permit Mr. Bienvenu to make any motions that he might wish to.

MR. BIENVENU:

The defendant moves the Court to enter a directed verdict herein in its behalf for the reason that there is no proof in the record that any damage to the house of Mr. and Mrs. West was a direct loss by flood within the meaning of the policy. And, further, because of the fact that the evidence brings the plaintiff's case within the exclusions of the policy which I have previously referred to. Perils excluded were A-1, 2 and 3, D.

THE COURT:

Had you completed, Mr. Bienvenu?

(423)

MR. BIENVENU:

Yes, sir.

THE COURT:

The Court will deny the motion. Of course, in this case,

A-101

there was direct evidence that there was actually water in the house. That makes it a much stronger case than the other case. The motion is denied.

(Court recessed).

(438)

...oOo...

(BY MR. BIENVENU):

Q You knew, did you not, or you were informed of the fact that there had been a flooding as a result of heavy rain in April, on the 17th and 18th?

(DR. CAPOZZOLI):

A Yes.

Q Did you form any conclusion as to whether or not that flooding had any effect on the foundation of the house and on the condition of the sunken corner that you found?

A Yes, I have an opinion, and I stated it quite strongly and I said, I do not believe the flood waters caused any significant changes in the house. All of the damage is due mostly to the type of soil on which the house rests and the type of construction.

...oOo...

(448)

...oOo...

(BY MR. BABIN):

Q Yes. Now, Doctor, in your report you said that flood water could affect the settling, is that correct? Did

(449)

you say this in your report?

A Let me look at it and I will tell you. I said could have accelerated the settling in one way.

Q Okay. Thank you very much.

A When the water rises, it will saturate the soil and will leave the soil wet after the water drops. This heavier saturated soil will weigh more and settle faster until it dries again. Heavier rains which occur quite often in this area could cause the same situation. Then, my summary was what I said before, I do not believe the flood water caused any significant change in the house.

Q Well, Doctor, I am not going to argue with you but the facts seem to defy your analysis in this respect, that no observable damage had occurred prior for up to six years, as the Wests had owned that home, and then after the flood occurred, then suddenly the cracking appears. Now, as we went through in the other case, how was this possible, you know, of giving the assumption that no cracks appeared?

A Well, sir, I don't know if this will be an answer to your question but as a result of our discussion yesterday, I looked around my bathroom while I was brushing my teeth and I found a few cracks that I didn't know about. I knew where

to look and I found them in my bedroom. I stopped looking around the rest of the house and that's a perfect example.

...oOo...

(455)

...oOo...

(PROCEEDINGS OUT OF THE PRESENCE OF THE JURY)

THE COURT:

The parties may make any motions they might wish to make at this time. Mr. Bienvenu?

MR. BIENVENU:

All right. Defendant moves the Court to enter a directed verdict herein in its behalf for the reason that plaintiff has failed to prove his claim under the policy of insurance. It has failed to satisfy the requirements of the policy. It has failed to show that the damage to which it refers was a direct loss by flood.

Further, plaintiff has failed to introduce evidence to show the amount which it would cost to repair or replace the property with material of like kind and quantity within a reasonable time after such loss without allowing for increased cost of repair or reconstruction by reasonable ordinary exception.

THE COURT:

The motion is --

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MR. BIENVENU:

Further, the evidence establishes that the loss comes within the exclusions to which we made reference, exclusions to the policy to which we made reference earlier A-1 and D.

THE COURT:

The motion is denied.

...oOo...

(84)

...oOo...

(Title Omitted)

No. 19,622

SPECIAL VERDICTS

F.R.C.P. 49(a)

We, the jury in the above-captioned case, unanimously find as follows:

INTERROGATORY NO. 1

Did the Wests sustain a direct loss to their property because of "flood"?

Answer "Yes" or "No".

ANSWER: Yes

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If your answer to No. 1 is "yes", then proceed:

INTERROGATORY NO. 2

In dollars and cents, how much damage was sustained to the property as a proximate result of "flood"?

ANSWER: \$17,500

(85)

We, the jury, have unanimously answered the above and foregoing interrogatories as here in indicated, and herewith return the same into court as our special verdicts.

s/ Russell Courville
FOREMAN OF THE JURY

Lafayette, Louisiana

February 3rd, 1976

Filed: Feb. 3, 1976

APPENDIX F

Flood Insurance Policies

NOTE: (1) The policies of flood insurance of the Daigles and the Wests were reproduced from counsel's file copies and not from the original exhibits (P-3 & W-2) introduced at trial because the record could not be located at the time this petition was being prepared. (See letter dated November 29, 1978 of the Deputy Clerk of Court of the United States District Court, Western District of Louisiana pp. A-118-9, infra).

(2) The standardized flood policy forms are identical in both the Daigle & West exhibits, thus that form is only reproduced once herein (pp. A-107-115). The individual Application & Declarations Forms of the Daigles' and the Wests' reproduced herein (pp. A-116-7), each were stapled to a standardized flood policy form in the original exhibits.

FLOOD INSURANCE POLICY

(Issued Pursuant to the National Flood Insurance Act of 1968
or Any Acts Amendatory Thereof)

INSURANCE COMPANIES MEMBERS OF
NATIONAL FLOOD INSURERS ASSOCIATION
NEW YORK, N.Y.

IN CONSIDERATION OF THE PROVISIONS AND STIPULATIONS HEREIN OR ADDED HERETO including the statements in the application and declarations form attached hereto, and of the premium specified in said application and declarations form, THIS COMPANY, for the term specified from inception date shown in said application and declarations form At Noon (Standard Time) to expiration date shown in said application and declarations form At Noon (Standard Time) at location of the property involved, to an amount not exceeding the amount(s) of insurance specified in said application and declarations form, DOES INSURE the insured named and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair; and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than interest of the Insured, against all DIRECT LOSS BY "FLOOD" as defined herein, to the property described while located or contained as described in the application and declarations form attached hereto, or pro rata for 30 days at each proper place to which any of the property shall necessarily be removed for preservation from the peril of "Flood", but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

"Flood"—Wherever in this policy the term "flood" occurs, it shall be held to mean a general and temporary condition of partial or complete inundation of normally dry land areas from (1) the overflow of inland or tidal waters, (2) the unusual and rapid accumulation or runoff of surface waters from any source, or (3) mudslides which are caused or precipitated by accumulations of water on or under the ground.

Perils Excluded—This Company shall not be liable for loss:

(a) By (1) rain, snow, sleet, hail or water spray; (2) freezing, thawing or by the pressure or weight of ice or water, except where the property covered has been simultaneously damaged by flood; or (3) water, moisture or mudslide damage of any kind resulting primarily from conditions, causes or occurrences which are solely related to the described premises or are within the control of the Insured (including but not limited to design, structural or mechanical defects, failures, stoppages or breakages of water or sewer lines, drains, pumps, fixtures or equipment, seepage or backup of water, or hydrostatic pressure) or any condition which causes flooding which is substantially confined to the described premises or properties immediately adjacent thereto;

(b) Caused directly or indirectly by (1) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack, (i) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces, or (ii) by military, naval or air forces, or (iii) by an agent of any such government, power, authority or forces, it being understood that any discharge, explosion or use of any weapon of war employing nuclear fission or fusion shall be conclusively presumed to be such a hostile or warlike action by such a government, power, authority or forces; (2) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence;

(c) By nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, or due to any act or condition incident to any of the foregoing, whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by the peril insured against by this policy;

(d) by fire, windstorm, explosion, erosion, earthquake, landslide or any other earth movement except such mudslides as are covered under the peril of flood, or by theft;

(e) Caused by or resulting from power, heating or cooling failure, unless such failure results from physical damage to power, heating or cooling equipment situated on premises where the property covered is located, caused by the peril insured against;

(f) Occasioned directly or indirectly by enforcement of any local or state ordinance or law regulating the construction, repair or demolition of building(s) or structure(s);

(g) Caused directly or indirectly by neglect of the Insured to use all reasonable means to save and preserve the property at the time of and after an occurrence of the peril insured against by this policy.

Property Not Covered—This policy shall not cover:

(a) Accounts, bills, currency, deeds, evidences of debt, money, securities, bullion, manuscripts or other valuable papers or records, numismatic or philatelic property;

(b) Fences;

(c) Outdoor swimming pools, bulkheads, wharves, piers, bridges, docks or other open structures located on or partially over water or property thereon.

Pair and Set Clause—If there is loss of an article which is part of a pair or set, the measure of loss shall be a reasonable and fair proportion of the total value of the pair or set, giving consideration to the importance of said article, but such loss shall not be construed to mean total loss of the pair or set.

Concealment, Fraud—This entire policy shall be void if, whether before or after a loss, the Insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the Insured therein, or in case of any fraud or false swearing by the Insured relating thereto.

Other Insurance—This Company shall not be liable for a greater proportion of any loss, less the amount of deductible, from the peril of flood than the amount of insurance under this policy bears to the whole amount of flood insurance (excluding therefrom any amount of "excess insurance" as hereinafter defined) covering the property, or which would have covered the property except for the existence of this insurance, whether collectible or not.

In the event that the whole amount of flood insurance (excluding therefrom any amount of "excess insurance" as hereinafter defined) covering the property exceeds the maximum amount of insurance permitted under the provisions of the National Flood Insurance Act of 1968, or any acts amendatory thereof, it is hereby understood and agreed that the insurance under this policy shall be limited to a proportionate share of the maximum amount of insurance permitted on such property under said Act, and that a refund of any extra premium paid, computed on a pro rata basis, shall be made by this Company upon request in writing submitted not later than 2 years after the expiration of the policy term during which such extra amount of insurance was in effect.

"Excess Insurance" as used herein shall be held to mean insurance of such part of the actual cash value of the property as is in excess of the maximum amount of insurance permitted under the said Act with respect to such property.

Added and Waiver Provisions—The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

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PROPERTY COVERED

A. Dwelling: The term "dwelling" shall mean a residential building designed for the occupancy of from 1 to 4 families and occupied principally for dwelling purposes by the number of families stated herein.

When the insurance under this policy covers a dwelling, such insurance shall include additions in contact therewith; also, if the property of the owner of the described dwelling and when not otherwise covered, building equipment, fixtures and outdoor equipment, all pertaining to the service of the described premises and while within an enclosed structure located on the described premises; also, materials and supplies while within an enclosed structure located on the described premises or adjacent thereto, intended for use in construction, alteration or repair of such dwelling or appurtenant private structures on the described premises.

The Insured may apply up to 10% of the amount of insurance applicable to the dwelling covered under this policy, not as an additional amount of insurance, to cover loss to appurtenant enclosed private structures (other than the described dwelling and additions in contact therewith) located on the described premises. This extension of coverage shall not apply to structures (other than structures used exclusively for private garage purposes) which are rented or leased in whole or in part, or held for such rental or lease, to other than a tenant of the described dwelling, or which are used in whole or in part for commercial, manufacturing or farming purposes.

B. Contents: When the insurance under this policy covers contents, such insurance shall cover all household and personal property usual or incidental to the occupancy of the premises as a dwelling—except animals, birds, fish, aircraft, motor vehicles (other than motorized equipment pertaining to the service of the premises and not licensed for highway use), trailers on wheels, watercraft including their furnishings and equipment, business property, other property not covered

under the provisions of this policy, and any property more specifically covered in whole or in part by other insurance including the peril insured against in this policy; belonging to the Insured or members of the Insured's family of the same household, or for which the Insured may be liable, or, at the option of the Insured, belonging to a servant or guest of the Insured; all while within an enclosed structure located on the described premises.

The Insured, if not the owner of the described premises, may apply up to 10% of the amount of insurance applicable to the contents covered under this policy, not as an additional amount of insurance, to cover loss to improvements, alterations and additions to the described dwelling and to appurtenant enclosed private structures as described above.

This Company shall not be liable for loss in any one occurrence for more than:

1. \$500.00 in the aggregate on paintings, etchings, pictures, tapestries, art glass windows and other works of art (such as but not limited to statuary, marbles, bronzes, antique furniture, rare books, antique silver, porcelains, rare glass or bric-a-brac);
2. \$500.00 in the aggregate on jewelry, watches, necklaces, bracelets, gems, precious and semi-precious stones, articles of gold, silver or platinum and furs or any article containing fur which represents its principal value.

C. Debris Removal: This insurance covers expense incurred in the removal of debris of or on the dwelling, appurtenant enclosed private structures or contents covered hereunder, which may be occasioned by loss caused by the peril insured against in this policy.

The total liability under this policy for both loss to property and debris removal expense shall not exceed the amount of insurance applying under this policy to the property covered.

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PROPERTY NOT COVERED

In addition to the kinds of property which are otherwise excluded under this policy, the following are also excluded from coverage:

- A. Land values; lawns, trees, shrubs or plants; underground structures or equipment outside the foundation walls of the dwelling covered hereunder;
- B. Those portions of walks, driveways and other paved surfaces which are outside of the dwelling covered hereunder.

DEDUCTIBLES

- A. With respect to loss to the dwelling, appurtenant enclosed private structures or debris removal covered hereunder, this Company shall be liable for only the amount of loss in any one occurrence which is in excess of: (a) \$200. or (b) 2% of the amount of insurance hereunder applying to the dwelling, whichever is the greater.
- B. With respect to loss to contents or debris removal covered hereunder, this Company shall be liable for only the amount of loss in any one occurrence which is in excess of: (a) \$200. or (b) 2% of the amount of insurance hereunder applying to the contents, whichever is the greater.

Cancellation of Policy or Reduction in Amount of Insurance—This policy may be cancelled at any time at the request of the Insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premiums above the customary short rates for the expired time; provided, however, that the premium paid for the then current policy term shall be fully earned if the Insured retains an interest in the property covered at the location described in the application and declarations form.

The amount of insurance under this policy may be reduced at any time at the request of the Insured, in which case this Company shall, upon demand, refund the excess of paid premiums above the customary short rates for the expired time for the amount of the reduction; provided, however, that the premium paid for the then current policy term shall be fully earned to the extent that the Insured retains an interest in the property covered at the location described in the application and declarations form.

This policy may be cancelled by this Company for non-payment of the premium by giving to the Insured a 20-days' written notice of cancellation.

Conditions Suspending or Restricting Insurance—Unless otherwise provided in writing added hereto, this Company shall not be liable for loss occurring while the hazard is increased by any means within the control or knowledge of the Insured, provided, however, this insurance shall not be prejudiced by any act or neglect of any person (other than the Insured), when such act or neglect is not within the control of the Insured.

Alterations and Repairs—Permission granted to make alterations, additions and repairs, and to complete structures in course of construction. In the event of loss hereunder, the Insured is permitted to make reasonable repairs, temporary or permanent, provided such repairs are confined solely to the protection of the property from further damage and provided further that the Insured shall keep an accurate record of such repair expenditures. The cost of any such repairs directly attributable to damage by the peril insured against shall be included in determining the amount of loss hereunder. Nothing herein contained is intended to modify the policy requirements applicable in case loss occurs, and in particular the requirement that in case loss occurs the Insured shall protect the property from further damage.

Property of Others—Unless otherwise provided in writing added hereto, loss to any property of others covered under this policy shall be adjusted with the Insured for the account of the owners of said property, except that the right to adjust such loss with said owners is reserved to this Company. Any such insurance under this policy shall not inure directly or indirectly to the benefit of any carrier or other bailee for hire.

Liberalization Clause—If during the period that insurance is in force under this policy, or within 45 days prior to the inception date thereof, on behalf of this Company there be adopted under the National Flood Insurance Act of 1968, or any acts amendatory thereof, any forms, endorsements, rules or regulations by which this policy could be extended or broadened, without additional premium charge, by endorsement or substitution of form, then such extended or broadened insurance shall inure to the benefit of the Insured hereunder as though such endorsement or substitution of form had been made.

Statutory Provisions—Any terms of this policy which are in conflict with the statutes of the State wherein the property is located are hereby amended to conform to such statutes, except that in cases of conflict with applicable Federal law or regulation, such Federal law or regulation shall control the terms of this policy.

Loss Clause—Payment of any loss under this policy shall not reduce the amount of insurance applicable to any other loss during the policy term which arises out of a separate occurrence of the peril insured against hereunder; provided, that all loss arising out of a continuous or protracted occurrence shall be deemed to constitute loss arising out of a single occurrence.

Mortgage Clause (Applicable to building items only and effective only when policy is made payable to a mortgagee (or trustee) named in the application and declarations form attached to this policy.)—

Loss, if any, under this policy, shall be payable to the aforesaid as mortgagee (or trustee) as interest may appear under all present or future mortgages upon the property described in which the aforesaid may have an interest as mortgagee (or trustee), in order of precedence of said mortgages, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided, also, that the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

If this policy is cancelled by this Company, it shall continue in force for the benefit only of the mortgagee (or trustee) for 20 days after written notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

Whenever this Company shall pay the mortgagee (or trustee) any sum for loss under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of said mortgagee's (or trustee's) claim.

Mortgagee's Obligations—If the Insured fails to render proof of loss, the named mortgagee (or trustee), upon notice, shall render proof of loss in the form herein specified within 60 days thereafter and shall be subject to the provisions of this policy relating to appraisal and time of payment and of bringing suit.

Requirements in Case of Loss.—The Insured shall give written notice, as soon as practicable, to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged property and put it in the best possible order. Within sixty days after the loss, unless such time is extended in writing by this Company, the Insured shall render to this Company a proof of loss, signed and sworn to by the Insured, stating the knowledge and belief of the Insured as to the following: the time and origin of the loss, the interest of the Insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss. The Insured, at the option of this Company, may be required to furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed, and verified plans and specifications of any building, fixtures or machinery destroyed or damaged.

The Insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal.—In case the Insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the Insured or this Company, such umpire shall be selected by a judge of a court of record in the State in which the insured property is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's Options.—It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within 30 days after the receipt of the proof of loss herein required.

Abandonment.—There shall be no abandonment to this Company of any property.

When Loss Payable.—The amount of loss for which this Company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the Insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Action Against the Company.—No suit or action on this policy for the recovery of

any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after the date of mailing of notice of disallowance or partial disallowance of the claim. An action on such claim against the Company may be instituted, without regard to the amount in controversy, in the United States District Court for the district in which the property shall have been situated.

Subrogation.—In the event of any payment under this policy, this Company shall be subrogated to all of the Insured's right of recovery therefor against any party, and this Company may require from the Insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company. The Insured shall do nothing after loss to prejudice such right; however, this insurance shall not be invalidated should the Insured waive in writing prior to a loss any or all right of recovery against any party for loss occurring to the described property.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized representative of this Company.



Attorney-in-Fact for the Insurance Companies
Members of National Flood Insurers Association

SPECIAL PROVISIONS

Wherever the term "Company" appears in this policy, it shall mean the Insurance Companies members of National Flood Insurers Association.

A list of all such Companies is on file in the office of the State Insurance Department of the State where the property covered is located and a copy may be obtained upon request from the office of the National Flood Insurers Association, 160 Water Street, New York, N.Y. 10038.

All notices or other communications required by this policy to be given to the Company shall be given to the Servicing Office designated on the Application and Declarations Form attached to this policy, and such notice shall be considered to constitute notice to the Company.

APPLICATION AND DECLARATIONS FORM

(For Use Only With the Flood Insurance Policy)

Insurance is provided only (1) against the peril of flood as defined in the policy to which this form is attached, (2) with respect to those items specifically described here, and for which a specific amount of insurance is shown below, and (3) for the policy term specified below; and, unless otherwise provided, all conditions and provisions of this form and of the policy to which it is attached shall apply separately to each item covered.

Not to be used with the U.S. Government

(PLEASE PRINT OR TYPE ALL INFORMATION REQUIRED)

Policy No. FL 573054

Insured's Name and Mailing Address
(Number, Street, City or Town, County, State, Zip Code)

Carl D. West

1206 Columbus Street

Morgan City, St. Mary, Louisiana 70380

RENEWAL: YES ☐ NO ☒
(IF RENEWAL, USE SAME NUMBER)

SPACE FOR AGENT'S NAME AND MAILING ADDRESS (Sticker)

Tidelands Insurance Agency, Inc.

P.O. Box 503

Morgan City, Louisiana 70380

Policy Term 1 Year, from 4/16/73 to 4/16/74

(See Note 1) Inception (Mo. Day Yr.) Expiration (Mo. Day Yr.) at Noon (Standard Time) at location of the property involved, and thereafter for successive policy terms of 1 year, provided the then current premium payable by the insured for each successive policy term is paid prior to the expiration of the then current policy term, and if not so paid this policy shall then terminate; provided, however, with respect to any mortgagee (or trustee) named below, this insurance shall continue in force only for the benefit of such mortgagee (or trustee) for 20 days after written notice to the mortgagee (or trustee) of termination of this policy, and shall then terminate.

ITEM NO.	AMOUNT OF INSURANCE	RATES	PREMIUMS	DESCRIPTION AND LOCATION OF PROPERTY COVERED (Location same as mailing address above unless otherwise indicated)
1. Dwg.	\$ 17,500.	.30	\$ 53.00	On the 1 Family 1 Story Dwelling of Brick-Veneer Construction, Bsmt. Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Located at 1206 Columbus Street Morgan City, La.
2. Conts.	\$ 5,000.	.40	\$ 20.00	On Contents in the Dwelling Described Above <input checked="" type="checkbox"/> or in the Family Story Dwelling of Construction, Bsmt. Yes <input type="checkbox"/> No <input type="checkbox"/> Located at
Notice: The Premium for this Policy reflects the participation of the U.S. Government under the National Flood Insurance Act		Total Premium →	\$ 73.00	

Mortgage Clause: Subject to the provisions of the Mortgage Clause in the policy, loss, if any, on dwelling building item shall be payable to:

(INSERT NAME(S) OF MORTGAGEE(S) OR TRUSTEE(S) AND MAILING ADDRESS(ES))

ADDITIONAL INFORMATION

Is a condition of this insurance that the property is not in violation of any Flood Plain Law or Ordinance. Zone _____; Substantial Flood Loss Paid after Area Identification Date, Yes ☐ No ☐; Month and Year of Start of New Construction or Substantial Improvement if after Area Identification Date _____; Estimated Actual Cash Value \$ 2,500 Foundation, Concrete Slab (no bsmt.) ☒ Other ☐; Mobile home on foundation, Yes ☐ No ☐; If Tenant, Floor(s) used or occupied, Bsmt. ☐ 1st ☒ 2nd or above ☐; Estimated Actual Cash Value \$ 12,000.; Tenant, Yes ☐ No ☐; If Tenant, Floor(s) used or occupied, Bsmt. ☐ 1st ☒ 2nd or above ☐.

AETNA CASUALTY & SURETY CO.

SERVICING COMPANY NAME AND ADDRESS

4/16/73

DATE OF APPLICATION

The above statements are correct to the best of my knowledge. I understand that any false statement may be punishable by fine or imprisonment under 18 U.S. Code, Sec. 1001.

5-3-73 H. B. Boudreaux Jr.
COUNTERSIGNATURE DATE AUTHORIZED REPRESENTATIVE

H. B. Boudreaux Jr.
SIGNATURE OF INSURED OR AGENT

CODING INFORMATION: TO BE COMPLETED BY N.F.I.A. SERVICING OFFICE

LINE NO. OF POL. BUL.	KIND OF LOSS	T Y P E	LOCATION	Z O N E	ELEVATION (+) OR (-)	FEET	NO. OF STORIES	C O N T.	B O R D E R	AMT. OF INS. (TOTAL)	PREMIUM		COMPANY I.D. NUMBER
											ACTUARIAL (\$ ONLY)	PAY. BY INSUR. (\$ ONLY)	
2	1	1	170230				2	1	1	173			
SWG.													
CONTS.													

To 1: The inception date of any new, increased or additional insurance coverage shall be at least 15 calendar days after the date of this application. This 15 day waiting period shall not apply during the initial 30 calendar days from the effective date of first availability of flood insurance in any designated area. 07

To 2: When only contents in a dwelling is covered, the estimated actual cash value of the dwelling must also be shown.

THE PROVISIONS PRINTED ON THE BACK OF THIS FORM ARE HEREBY REFERRED TO AND MADE A PART HEREOF.

INSURANCE COMPANIES MEMBERS OF
NATIONAL FLOOD INSURERS ASSOCIATION
(114 COOPERATION WITH THE U.S. GOVERNMENT)

(PLEASE PRINT OR TYPE ALL INFORMATION REQUIRED)

Insurance is provided only (1) against the peril of flood as defined in the policy to which this form is attached, (2) with respect to those items specifically described herein and for which a specific amount of insurance is shown below, and (3) for the policy term specified below; and, unless otherwise provided, all conditions and provisions of this form and of the policy to which it is attached shall apply separately to each item covered.

SPACE FOR AGENT'S NAME AND MAILING ADDRESS (OPTION)

Wilson & Company

21 Feb 45

Wm. J. W. Co. 1850-1851

Policy Term 1 Year, from 5/31/13 to 5/31/14

(See Note 1) inception (Mo. Day Yr.) Expiration (Mo. Day Yr.) at Noon (Standard Time) at location of the property involved, and thereafter for successive policy terms of 1 year, provided the then current premium payable by the Insured for each successive policy term is paid prior to the expiration of the then current policy term, and if not so paid this policy shall then terminate; provided, however, with respect to any mortgagee (or trustee) named below, this insurance shall continue in force only for the benefit of such mortgagee (or trustee) for 20 days after written notice to the mortgagee (or trustee) of termination of this policy, and shall then terminate.

ITEM NO.	AMOUNT OF INSURANCE	RATES	PREMIUMS	DESCRIPTION AND LOCATION OF PROPERTY COVERED (Location same as mailing address above unless otherwise indicated)
1. Dw.	\$12,500	1.30	\$53.00	On the 1 Family 1 Story Dwelling of Brick Construction, Bsmt. Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Located at 3200
2. Cdn.	\$5,000	40	\$20.00	On Contents in the Dwelling Described Above <input checked="" type="checkbox"/> or In the Family Story Dwelling of Construction, Bsmt. Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Located at
Notice: The Premium for this Policy reflects the participation of the U.S. Government under the National Flood Insurance Act.				

Liens Clause: Subject to the provisions of the Mortgage Clause in the policy, loss, if any, on dwelling building item shall be payable to:

Trade Federal Savings & Loan Assoc. P.O. Drawer 586
 Trade Fed. Ins. 70538

ADDITIONAL INFORMATION

It is a condition of this insurance that the property is not in violation of any Flood Plain Law or Ordinance. Zone _____; Substantial Flood Loss Paid after Area Identification Date, Yes ☐ No ☒ Month and Year of Start of New Construction or Substantial Improvement if after Area Identification Date _____
 Dwelling: Estimated Actual Cash Value \$ 21,000; Foundation, Concrete Slab (no bsmt.) ☒ Other ☐ Mobile home on foundation, Yes ☐ No ☐
 Contents (See Note 2) Estimated Actual Cash Value \$ 8,000; Tenant, Yes ☐ No ☒ If Tenant, Floor(s) used or occupied, Bsmt. ☐ 1st ☐ 2nd or above ☐

AETNA CASUALTY & SURETY CO.

SERVICING COMPANY NAME AND ADDRESS

2/22/73

2/26/73
DATE OF APPLICATION
The above statements are correct to the best of my knowledge. I understand that any false statement may be punishable by fine or imprisonment under 18 U.S. Cg2a, c. 5003-7.

COUNTERSIGNATURE DATE

AUTHORIZED REPRESENTATIVE

CODING INFORMATION, TO BE COMPLETED BY N.F.A. SERVICING OFFICE

[illegible]

Note 1: The inception date of any new, increased or additional insurance coverage shall be at least 15 calendar days after the date of this application. This 15 day waiting period shall not apply during the initial 30 calendar days from the effective date of first availability of flood insurance in any designated area.

Note 2: When only contents in a dwelling is covered, the estimated actual cash value of the dwelling must also be shown.

THE PROVISIONS PRINTED ON THE BACK OF THIS FORM ARE HEREBY REFERRED TO AND MADE A PART HEREOF

A-118

UNITED STATES DISTRICT COURT
Office of the Clerk
Western District of Louisiana

P.O. Box 106
Shreveport, La. 71161
November 29, 1978

Mr. Leopold B. Babin
Attorney at Law
P.O. Box 406
Houma, LA 70361

RE: CIVIL ACTION NO. 19622-L
Karl D. West vs.
National Flood Insurers Assoc.

CIVIL ACTION NO. 19624-L
Andrew J. Daigle vs.
National Flood Insurers Assoc.

Dear Sir:

Pursuant to your request for copies of Exhibit W-2 in 19622 and Exhibit P-3 in 19624, we show the above captioned records not having been returned by the Court of Appeals.

However, in a conversation with the Court of Appeals, they show having mailed them back to our office on August 7, 1978 with a copy of the mandate. In checking their file, they show no receipt from our office in receiving said records

A-119

or mandate.

Very truly yours,

ROBERT H. SHEMWELL, CLERK

By: s/ Angene K. Seigfried
Deputy Clerk

aks
RECEIVED
Dec 1, 1978

APPENDIX G

Motions, Notice of Appeals, Memorandum, Rulings, Petition for Rehearing, and Order Extending Time to file Petition for Writ of Certiorari

(86)

(Title Omitted)

No. 19,622
19,624

MOTION FOR JUDGMENT NOTWITHSTANDING THE
VERDICT AND IN THE ALTERNATIVE, FOR A
NEW TRIAL, IN EACH CASE

Defendant, National Flood Insurers Association shows the Court that a motion for a directed verdict was filed herein in each case at close of the evidence of the plaintiff and at the close of all of the evidence in the case, and that the motions were denied by the Court.

Defendant, now moves the Court to have the verdict entered herein and the judgment which was entered thereon in each case, set aside and a judgment rendered in favor of defendant in accordance with the motion for a directed

(87)

verdict, on the following grounds, to-wit:

A.

Plaintiff has not adduced sufficient evidence on which to base the verdict in his favor and against defendant.

B.

The evidence does not establish that the property of the plaintiff was damaged as a result of a "direct loss by flood" within the terms and provisions of the policy of insurance.

C.

The evidence establishes that the damage, if any, to the property of plaintiff, subsequent to the date of the policy of insurance was not a direct loss by flood.

D.

The evidence establishes that the damage to the property of plaintiff, if any, was a result of an excluded peril of the policy and within the exclusive provisions of Paragraph A, (3), because it was caused by design, structural or mechanical defect and failures.

E.

The evidence establishes that the damage to the property of plaintiff, if any, was a result of an excluded peril of the policy and within the exclusive provisions of Paragraph (d), because it was caused by earth movement.

...oOo...

(24)

(Title Omitted)
No. 19,624

HUNTER, SENIOR JUDGE:

MEMORANDUM RULING ON PENDING MOTIONS

Defendant has filed post-trial motions insisting that it was for the court and not the jury to decide whether the alleged loss to the property of plaintiff was a "direct loss by flood." In addition, defendant insists that the court

(25)

and not the jury should have decided whether the damage, if any, to plaintiff's property was a result of the excluded peril. In addition, defendant insists that the evidence adduced by the plaintiff does not establish "the amount which it would cost to repair or replace the property with material of like kind and quality."

The jury, in response to interrogatories, found that (1) plaintiff sustained a direct loss to his property because of "flood." (2) Plaintiff sustained damage as a proximate result of the flood in the amount of \$12,084.56.

The applicable standard to guide the Court in the granting or denial of a motion for judgment notwithstanding the verdict was carefully delineated by the United States Court of Appeals for the Fifth Circuit in *Boeing Company v. Shipman*, 411 F.2d 365 (en banc):

On Motions for directed verdict and for judgment notwithstanding the verdict, the Court should consider all of the evidence-- not just that evidence which supports the non-mover's case--but in the light and with all reasonable inferences most

favorable to the party opposed to the motion*** /I/f there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions shall be denied, and the case submitted to the jury * * *. There must be a conflict on substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and

(26)

inferences and determine the credibility of witnesses." 411 F.2d at 374-375 (footnotes omitted.)

We conclude that there was sufficient evidence under *Boeing Co. v. Shipman*, supra, to go to the jury on both the issue of "direct loss because of flood?" and "damage sustained as a proximate result of flood."

We next turn to a consideration of the defendant's alternative motion for a new trial on the grounds that the evidence was insufficient to support the jury verdict. It is critical that the case law on this point be read against the background of the Seventh Amendment which provides that:

Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any

any Court of the United States, than according to the rules of the common law."

This constitutional provision obviously cannot be applied so as to foreclose any scrutiny of a jury's factfindings; it expresses, however, in clear terms the principle that facts once found by a jury in the context of a civil trial are not to be re-weighed and a new trial granted lightly. The standard adopted by the Fifth Circuit is that the district court should not grant a new trial motion unless the jury verdict is "at least against the great weight of the evidence." *Cities Service Oil Company v.*

(27)

Launey, 403 F.2d 537 at 540 (5th Cir., 1968). A rule which would permit a court to grant a new trial when the verdict was merely against the "greater weight" of the evidence, the Fifth Circuit said, "would destroy the role of the jury as the principal trier of the facts and would enable the trial judge to disregard the jury's verdict at will. Applying the test enunciated in *Cities Service*, we conclude, after careful consideration of the record, that we must decline to grant a new trial.

As to remittitur, our opinion is in a similar vein. We are not free to re-weigh the damage evidence and "cut the jury verdict" merely because the jury gave the plaintiff an award far in excess of what we would have given him. We conclude that the jury verdict, on all issues, is not against the "great weight of the evidence," as required in this circuit in order to justify a grant of a new trial.

Plaintiff has requested a new trial on the question of penalties, attorneys fees and interest. This motion is denied.

Honorable Nauman Scott, Chief Judge of this court, in *Drewett v. Aetna Casualty Company*, Civil Action No. 74806, has previously denied penalties and attorney's fees in cases against the National Flood Insurers Association. Honorable E. Gordon West, Chief Judge of the Middle District of Louisiana, in *Summers v. National Flood Insurers Association*, Civil Action No. 74-277, considered the problem of in-

(28)

terest and decided it was to run from date of judgment until paid. We agree.

The policy of insurance did provide for a \$200 deductible from the amount of any loss. This deduction will be made on the amended judgment which is signed and made a part hereof.

It is true that the Daigle policy names Teche Federal Savings and Loan Association as the mortgagee payee, but it does not appear as a party to the lawsuit and we are now told in plaintiff's brief that this mortgage has now been paid off.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 10th day of May, 1976.

s/ Edwin F. Hunter, Jr.

UNITED STATES DISTRICT

JUDGE

Filed May 11, 1976,

...da...

A-126

(29)

...o0o...

(Title Omitted)

No. 19,624

NOTICE OF APPEAL

Notice is hereby given that National Flood Insurers Association, defendant in the above numbered and entitled case, hereby appeals to the United States Court of Appeal for the Fifth Circuit from the verdict of the jury and any judgment entered thereon.

BIENVENU, FOSTER, RYAN &
O'BANNON

BY: P.A. Bienvenu

Filed

May 20, 1976

...o0o...

(105)

...o0o...

(Title Omitted)

No. 19,622

HUNTER, SENIOR JUDGE:

MEMORANDUM RULING ON PENDING MOTIONS

Defendant has filed post-trial motions insisting that it was for the court and not the jury to decide whether the al-

A-127

leged loss to the property of plaintiff was a "direct loss by flood." In addition, defendant insists that the court and not the jury should have decided whether the damage, if any, to plaintiff's property was a result of the excluded peril. In addition, defendant insists that the evidence adduced by the plaintiff does not establish "the amount which it would cost to repair or replace the property with material of like kind, and quality."

The jury, in response to interrogatories, found

(106)

that

(1) plaintiff sustained a direct loss to his property because of "flood;"

(2) plaintiff sustained damage as a proximate result of the flood in the amount of \$17,500.

The applicable standard to guide the court in the granting or denial of a motion for judgment notwithstanding the verdict was carefully delineated by the United States Court of Appeals for the Fifth Circuit in *Boeing Company v. Shipman*, 411 F 2d 365 (en banc):

On Motions for directed verdict and for judgment notwithstanding the verdict, the Court should consider all of the evidence -- not just that evidence which supports the non-mover's case -- but in the light and with all reasonable inferences most favorable to the party opposed to the motion *** /I/f

there is substantial evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions shall be denied, and the case submitted to the jury ***. There must be a conflict on substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." 411 F 2d at 374-375 (footnotes omitted).

We conclude that there was sufficient evidence under *Boeing Co. v. Shipman*, supra, to go to the jury on both the issue of "direct loss because of flood" and "damage sustained as a proximate result of flood."

(107)

We next turn to a consideration of the defendant's alternative motion for a new trial on the grounds that the evidence was insufficient to support the jury verdict. It is critical that the case law on this point be read against the background of the Seventh Amendment which provides that:

"Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

This constitutional provision obviously cannot be applied

so as to foreclose any scrutiny of a jury's factfindings; it expresses, however, in clear terms the principle that facts once found by a jury in the context of a civil trial are not to be re-weighed and a new trial granted lightly. The standard adopted by the Fifth Circuit is that the District Court should not grant a new trial motion unless the jury verdict is "at least against the great weight of the evidence." *Cities Service Oil Company v. Launey*, 403 F. 2d 537 at 540 (5th Cir., 1968). A rule which would permit a court to grant a new trial when the verdict was merely against the "greater weight" of the evidence, the Fifth Circuit said, "would destroy the role of the jury as the principal trier of the facts and would enable the Trial Judge to disregard the jury's verdict at will." Applying the test enunciated in *Cities Service*, we conclude, after careful

(108)

consideration of the record, that we must decline to grant a new trial.

As to remittitur, our opinion is in a similar vein. We are not free to re-weigh the damage evidence and "cut the jury verdict" merely because the jury gave the plaintiff an award far in excess of what we would have given him. We conclude that the jury verdict, on all issues, is not against the "great weight of the evidence," as required in this circuit in order to justify a grant of a new trial.

Plaintiff has requested a new trial on the question of penalties, attorneys' fees and interest. This motion is denied. Honorable Nauman Scott, Chief Judge of this court, in *Drewett v. Aetna Casualty Company*, Civil Action No. 74806 has previously denied penalties and attorneys' fees in cases

against the National Flood Insurers Association. Honorable E. Gordon West, Chief Judge of the Middle District of Louisiana, in *Summers v. National Flood Insurers Association*, Civil Action No. 74-277, considered the problem of interest and decided it was to run from date of judgment until paid. We agree.

The policy of insurance did provide for a \$200 deductible from the amount of any loss. This deduction will be made on the amended judgment which is to be signed and made a part hereof.

(109)

It is true that the West policy does not name Teche Federal Savings and Loan Association as the mortgage payee, and that it does not appear as a party to the law suit. Nevertheless, we hold that Teche Federal Savings and Loan Association's mortgage be paid by preference and priority out of the judgment. This we understand is in accordance with the pre-trial stipulation. Counsel for plaintiff should set forth in the judgment the amount of the mortgage.

It is fitting and proper that the Court refer briefly to the evidence as it relates to the cost to repair or replace the West property. Mr. L. L. Patterson of Morgan City, Louisiana, testified that it would require \$22,956 to replace the property. In essence, he said that it would be impractical "to beef up the slab." He testified that the entire structure would have to be demolished and that it would cost \$22,956 to replace it. It was necessary to replace the structure, in his opinion, because the slab was so cracked and the foundation so crushed that any effort to "beef up" the slab would only

give temporary relief, which would last no longer than one or two years. To be sure, there was testimony to the contrary, but the jury obviously accepted Mr. Patterson's testimony.

As a matter of equity, it might well be argued that Mr. West is going to be able to keep his house and collect his policy limits under the judgment. This is true, but we

(110)

note that the policy contains a provision pursuant to which the insurer could have had the property appraised and, thereafter, had the option to take all of the property at the agreed or appraised value. We note, too, that the insurer had the option to repair, rebuild or replace the property with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within 30 days after receipt of the proof of loss.

Judgment for plaintiff in accordance with this memorandum ruling. Counsel for plaintiff shall promptly submit for signature an appropriate judgment.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 12th day of May, 1976.

s/ Edwin F. Hunter, Jr.
United States District Judge

Filed
May 13, 1976

A-132

(Title Omitted)

No. 19,622

NOTICE OF APPEAL

Notice is hereby given that National Flood Insurers Association, defendant in the above numbered and entitled case, hereby appeals to the United States Court of Appeal for the Fifth Circuit from the verdict of the jury and

(111)

and judgment entered thereon.

BIENVENU, FOSTER, RYAN &
O'BANNON

BY: P.A. Bienvenu

Filed
May 20, 1976

A-133

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-2531

Filed: July 28, 1978

Carl D. WEST,
Plaintiff-Appellee-Cross-Appellant,

v.

Patricia Roberts HARRIS, Secretary of the United States
Department of Housing and Urban Development,
Defendant-Appellant-Cross-Appellee.

Andrew J. DAIGLE,
Plaintiff-Appellee-Cross-Appellant,

v.

Patricia Roberts HARRIS, Secretary of the United States
Department of Housing and Urban Development,
Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the
Western District of Louisiana.

ON PETITION FOR REHEARING

(July 28, 1978)

Before CLARK and GEE, Circuit Judges, and LYNNE*, District Judge.

*Senior District Judge of the Northern District of Alabama,
sitting by designation.

A-134

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

S/ Charles Clark
United States Circuit Judge

A-135

SUPREME COURT OF THE UNITED STATES

NO. A-331

CARL D. WEST, ET AL.,
Petitioners,

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF
HOUSING AND URBAN DEVELOPMENT

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel
for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ
of certiorari in the above-entitled cause be, and the same is
hereby, extended to and including December 20, 1978.

s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 11 day of October, 1978

APPENDIX H

CINCOTTA -VS- NATIONAL FLOOD INSURERS
ASSOCIATION, NO. 75-C-1833 (D.C., N.Y. 1977)UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORKJOSEPH A. CINCOTTA and
JUDITH A. CINCOTTA,

No. 75-C-1833

Plaintiffs

Memorandum of Decision
and Order

-against-

NATIONAL FLOOD INSURERS ASSOCIATION,

Defendant.

December 13, 1977

APPEARANCES:

CORDES, PURCELL, FRITZ & INGRAO, P.C.

Attorneys for Defendant

204 Willis Avenue

Mineola, New York 11501

GUY R. VITACCO, ESQ.

Attorney for Plaintiffs

87-10 Queens Boulevard

Elmhurst, New York 11373

MISHLER, CH. J.

Plaintiffs purchased a single family dwelling in 1969 (built

in the 1940's) located at 2860 Alder Road, Bellmore, Long Island on a plot of land 60' x 70'. The rear (south side) of the house is 18' from a canal. The rear yard slopes to the top of the bulkhead of the canal so that the top of the bulkhead is approximately 20" lower than the lot line at the rear of the house. The basement of the house is constructed of concrete block buttressed by an inner concrete wall. The basement floor is approximately two feet below the high water mark of the channel. Plaintiffs have experienced seepage of water in the basement to a level of about 2" periodically two or three times each year. The heating system, fired by an oil burner, is protected against the flooding by a concrete lip. The basement has a sump pump, that operates automatically when the water in the basement reaches a level of 5".

On Sunday December 15, 1974 the area witnessed heavy rains that continued into Monday December 16, 1974. At about noon of December 19, 1974 the waters of the canal crested and overflowed through the basement window and flooded the basement to a height of 20".

The plaintiffs instituted this action for damages incurred as a result of the flood on December 16, 1974 based on a policy of insurance issued by the defendant through the Great American Insurance Co., insuring "against all direct loss by flood" ¹ in the maximum amount of \$17,500 on the dwelling (in addition to \$5,000 on contents). Defendant disclaims liability on the ground that the damages claimed "...are not damages as covered by the [within] policy of insurance as said policy of insurance does not cover damages

1. Flood is defined in the policy in pertinent part as "...a general and temporary condition of partial or complete inundation of normally dry land areas from (1) the overflow of inland tidal waters..."

caused by or as a result of pre-existing conditions, pre-existing damages and/or damages pre-existing." (Second affirmative defense).²

Policies of insurance are construed liberally in favor of the insured. *Aschenbrenner v. United States Fidelity & Guaranty Co.*, 292 U.S. 80, 54 S.Ct. 590 (1934). The insurer drafts the language determining the scope of the coverage and the exclusions. "[I]f the insurer desires to have more remote causes determine the scope of the exclusions he may draft language to effectuate that desire." (emphasis added). *Pan American World Air., Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1007 (2d Cir. 1974).

The occasional presence of water in the basement may have weakened the foundation but the flooding on December 16, 1974 was the immediate and direct cause of the settling of the foundation and damage to the concrete block wall and to the inner concrete east wall of the basement.

Since an action on a contract of insurance ". . . is not a tort action, the horrendous niceties of the doctrine of so-called 'proximate cause,' employed in negligence suits, apply in a limited manner only to insurance policies." *New York, New Haven and Hartford R. Co. v. Gray*, 240 F.2d 460, 465 (2d Cir. 1957). The concept of proximate cause when applied to actions on insurance policies is what men would ordinarily think of as the cause of the loss, *Bird v. St. Paul Fire and Marine Insurance Co.*, 224 N.Y. 47, 52, 120 N.E.

2. The defense further alleges that plaintiffs knew and concealed the existence of the pre-existing condition and damage. No evidence was offered to support this affirmative defense except the presence of water to the height of two inches on two or three occasions each year.

86, 87 (1918). The words "all direct loss by flood" "limits the inquiry to the facts immediately surrounding the loss" *Pan American World Air., Inc. v. Aetna Cas. & Sur. Co.*, supra at 1006.

The court finds that the flood of December 16, 1974 proximately caused the damage to the foundation. The court finds that plaintiffs were damaged in the amount of \$13,500.

The Clerk is directed to enter judgment in favor of plaintiffs and against defendant in the amount of \$13,500 together with interest from February 17, 1975 together with costs and disbursements.

The judgment sum shall first be applied to the payment of the mortgage lien. The court retains jurisdiction over the subject matter of the litigation for the purpose of determining the payment to the mortgagee. In the event of a dispute the judgment debtor may satisfy the judgment by paying the judgment sum to the Clerk of the court to be held by him subject to the further order of the court.

s/ Jacob Mishler
U.S.D.J.

A-140

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOSEPH A. CINCOTTA, and
JUDITH A. CINCOTTA,
Plaintiffs

Judgment

against

NATIONAL FOOD INSURERS
ASSOCIATION
Defendant

75 C 1833

Filed: Dec 13, 1977

A memorandum and order of Honorable Jacob Mishler, United States District Judge, having been filed on December 13, 1977, directing the Clerk to enter judgment in favor of plaintiffs and against defendant in the amount of \$13,500 together with interest from February 17, 1975 together with costs and disbursements, it is

ORDERED and ADJUDGED that judgment is awarded in favor of plaintiffs and against defendant in the amount of \$13,500 together with interest from February 17, 1975 together with costs and disbursements.

Dated: Brooklyn, New York
December 13, 1977

LEWIS ORGEL
Clerk

BY: s/ Thomas B. Costein
Chief Deputy Clerk

A-141

APPENDIX I

Excerpts from 1968 U.S. Code Cong. & Admin. News
(pp. 2966-67, 3026)

(2966)

NEED FOR A FLOOD INSURANCE PROGRAM

Heavy losses over the years from hurricanes in the coastal areas and from storms in inland areas of the Nation dramatize the lack of insurance protection against flood damage. Insurance protection against the risk of destruction caused by tornadoes and other natural catastrophes is generally available, but it is not available against the risk of flood loss.

Communities along the seacoast or in a river basin become completely immobilized following a major flood. Usually they must depend on the Federal Government and voluntary relief agencies to provide various forms of assistance. Some State and local governments have limited programs to assist a flood-stricken area, but disaster relief from all of these sources is inadequate to provide for the necessary restoration of heavily damaged areas. These facts underline the need for a program which will make insurance against flood damage available, encourage persons to become aware of the risk of occupying the flood plains, and reduce the mounting Federal expenditures for disaster relief assistance.

(2967)

DESCRIPTION OF THE TITLE

The Secretary of Housing and Urban Development will establish a program of flood insurance, as a joint venture between the Federal Government and the private insurance industry. The bill permits as an alternative, but only if necessary, an all-Federal program with or without participation by companies, agents, or brokers as fiscal agents.

COVERAGE

Under this title, insurance will be made available for one-to four-family residential properties and for smaller business properties such as the typical neighborhood family enterprise. The committee wishes to point out that because rate data for these properties are not now available, rate studies of these small business properties must be carried out before coverage can be provided.

Flood insurance could be expanded to cover other types and classes of properties (such as other business, agricultural, and other properties), only when, on the basis of studies and other information, this was found feasible, and only after further congressional action. There will therefore be an ample opportunity for the Congress to appraise the feasibility of including any other properties in the program....

...oOo...

(3026)

CHAPTER IV - APPROPRIATIONS AND MISCELLANEOUS PROVISIONS

Section 1170. Definitions

This section contains definitions of the basic terms used in the title. Under these definitions (1) *"flood" has such meaning as may be prescribed in regulations of the Secretary, and may include inundation from rising waters or from the overflow of streams, rivers, or other bodies of water, and from tidal surges, abnormally high tidal water, tidal waves, tsunamis, hurricanes, and other severe storms or deluge;* (2) *"United States" and "State" include the several States, the District of Columbia, the territories and possessions, the*

Commonwealth of Puerto Rico, and the Trust Territory of the Pacific Islands; (3) *"insurance company," "other insurer," and "insurance agents and brokers," include organizations or individuals authorized to engage in the insurance business under the laws of any State;* (4) *"insurance adjustment organization" includes organizations or individuals engaged in the business of adjusting loss claims arising under insurance policies issued by any insurance company or other insurer;* (5) *"person" includes any individual, group of individuals, corporation, partnership, association, or other organized group, including State and local governments and agencies; and* (6) *"Secretary" means the Secretary of Housing and Urban Development...*

No. 78-1001

Supreme Court, U. S.

FILED

FEB 9 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

CARL D. WEST AND ANDREW J. DAIGLE, PETITIONERS

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF HOUSING
AND URBAN DEVELOPMENT

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

WADE H. MCCREE, JR.
*Solicitor General
Department of Justice
Washington, D.C. 20530*

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1001

CARL D. WEST AND ANDREW J. DAIGLE, PETITIONERS

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF HOUSING
AND URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION

Petitioners assert that their claims under flood insurance policies issued pursuant to the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, were improperly denied.

1. Petitioners West and Daigle brought suit asserting claims as insureds under policies issued in accordance with the National Flood Insurance Act of 1968. After a consolidated jury trial, West obtained a verdict of \$17,500, the policy limit, and Daigle obtained a verdict of \$12,084.56 (Pet. App. A-6).¹ The insurer appealed.²

¹Each award was subsequently reduced by the \$200 deductible under the policy (*ibid.*).

²The Secretary of Housing and Urban Development now administers the flood insurance program. 42 U.S.C. 4011. Prior to January 1, 1978, the National Flood Insurers Association operated the insurance program (see Pet. App. A-6 n.1.)

The court of appeals held that although there was flooding in or near petitioners' houses at about the time structural damage to them was first observed, the expert testimony "established without contradiction that the immediate cause of the damage was the settlement of the house due to uneven soil support" (Pet. App. A-11, A-14). The insurance policies at issue specifically exclude liability for loss due to "any * * * earth movement" except mudslides.³ The court of appeals consequently reversed, concluding that the district court "should have applied the policy exclusion to the undisputed evidence and directed a verdict for [the insurer]" (Pet. App. A-12, A-15).⁴

2. Petitioners contend here (Pet. 9-16) that a jury question was presented about the extent of flood damage because they introduced sufficient evidence showing that structural damage to the foundations of their houses was caused directly by flood waters. This evidentiary issue was resolved against petitioners by the court of appeals, however, and does not merit further review by the Court. In any event, petitioners' claim that the damage was caused directly by the "force of the flood waters" (Pet. 11), rather than earth movements, is unsupported by the record; the foundations of the houses were at all times embedded firmly in earth and damage to them therefore necessarily was caused by earth movement (see Pet. App. A-9, A-13).

³The policies provided: "Perils Excluded—This Company shall not be liable for loss: * * * (d) by * * * erosion, earthquake, landslide or any other earth movement except such mudslides as are covered under the Peril of flood * * *" (Pet. App. A-7 to A-8). The court of appeals found "no evidence of a mudslide in this record" (Pet. App. A-11).

⁴As to petitioner West, however, the court of appeals also remanded for a new trial on the issue of water damage to the interior and contents of the West house that resulted when flood waters entered the house to the depth of one and one-half inches (Pet. App. A-13, A-15).

The decision of the court of appeals applying the exclusion for "earth movement" is consistent with the purposes of the National Flood Insurance Act (see Pet. 16-23).⁵ The Act authorizes the Secretary to provide by regulation the limits on coverage necessary to carry out the flood insurance program. 42 U.S.C. 4013(a). In accordance with the definition of flood contained in the Act, generally limiting flood to "inundation" or "overflow" from rising waters (42 U.S.C. 4121(a)(1)),⁶ the Secretary appropriately excluded by regulation losses by "land slippage" other than mudslide. 24 C.F.R. 1911.4(c) (1977) (Pet. App. A-35). And the policies here, consistent with this regulation, properly excluded losses by "earth movement."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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⁵The legislative history relied on by petitioners (Pet. 19-20) simply establishes that mudflows are a covered risk, whether or not a landslide is already in progress; it also demonstrates that landslides clearly are not a covered risk, regardless of their cause.

⁶The Act also covers risk of mudslides proximately caused by accumulations of water, 42 U.S.C. 4121(b), and the collapse or subsidence of shore land caused by water exceeding "anticipated cyclical levels." 42 U.S.C. 4121(c).